THE THEORY

OF THE

SOCIAL COMPACT

AND ITS INFLUENCE UPON THE

AMERICAN REVOLUTION.

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CHAPTER I.

THE social compact theory was first enunciated systematically by Hobbes, in the seventeenth century, and received its fullest development at the hands of Rousseau about the middle of the eighteenth. We find the terms, "social compact" and "social contract," used interchangeably by many political writers. Some, however, employ the former exclusively, protesting against all contract theories of government as involving no legal sanction.[1] Compact seems to imply an agreement of the people, either with the legislative power, or among themselves, concerning the same rights; but contract would rather imply a bargain entered into by the executive power with the people concerning their different rights.[2] One is based upon the plighted faith of men, agreeing to observe certain general articles of equal interest to all; the other is simply a bargain, to which certain conditions have been attached.

In Feudalism we find a relic of imperial despotism. The decay of this system, together with the attacks on papal supremacy by continental reformers, induced monarchs to seek to bolster up their authority by an appeal to the divine right of kings. Men who advocated this doctrine scouted the idea that reciprocal rights and duties existed between monarchs and their subjects. To the latter, such a position was unsatisfactory, and practically made the happiness of each citizen depend upon the caprice of a ruler claiming to be divinely commissioned. Political thinkers, therefore, began to seek an antidote against the irresponsibility of kings, an antidote which should serve as a basis for the recognition of individual rights. This they found in the contract law of Rome. History

[1] E. C. Clark, Practical Jurisprudence, p. 144.
[2] Abingdon, Thoughts on the Letters of Burke, 1777, p. 30.

seems to show that the sphere of imperative law has been gradually shrinking, because of the increasing prominence given to contract. At the period to which our attention is directed, there was a tendency to trace all jurisprudence to a single source, for which jurisprudence itself is to blame. Its flexible terminology had been gradually taken into the domain of political science. Jurists sought to strip imperative law of any claim to divine origin, and trace the inception of all law to a system of contract.

Austin considers that the main essentials of a contract are that there be an intention on the part of the promiser to do or not to do a certain act, with a corresponding expectation of the promisee that the former will fulfill the promise.[1] This, however, according to Roman law, was a pact or convention, and not a genuine contract.[2] It embraced the maximum mental force which could result from such an agreement between the parties. To make it obligatory, a "nexum," or "juris vinculum," must be added.

Now, of the four great classes of Roman contracts, consensual, or contracts, "juris gentium," were the most important. In these the consensus of the parties produced, *ipso facto*, a nexum or obligation. Set *formulæ*, a written entry in a ledger, or the actual delivery of goods, had formed the obligation in other species of contracts. Through the commercial development of Italy, consensual contracts became more generally used than the others. There is no reason, however, to think that they were ancient. Maine considers that they "were the latest born in the Roman system;"[3] in fact, the term "juris gentium" would seem to stamp them as a late introduction into Roman law. Modern jurists thought they saw in them extreme antiquity. On the other hand, they were so engrossed in theorising upon the state of nature, that, as frequently happens, this conception began to be looked upon as a positive historical fact, merely from the frequency with which it was discussed. They had already identified the law of

[1] Austin, Lectures on Jurisprudence. Vol. I, p. 326.
[2] Maine, Ancient Law, p. 323.
[3] Maine, Ancient Law, p. 334.

nations with the law of nature. What more natural than that they should consider contracts "juris gentium," as those peculiar to the state of nature itself. To this imperfect apprehension of Roman contract law we may probably trace the rise of the social compact theory of government.

Some jurists have found the origin of this theory in an implied or tacit contract. This is the view of Zallinger,[1] Barbeyrac,[2] and substantially, of Blackstone.[3] It arose from following the erroneous doctrine laid down in the Institutes of Justinian. He calls obligations, arising neither from contract nor delict, obligations "*quasi ex contractu.*"[4] The fact is, that such obligations do not spring from consent, but immediately from law itself. My obligation (*e. g.*, to pay taxes) does not come into existence through contract. It is the creature of positive law. We find that implied contracts and quasi contracts differ radically.[5] In the former, the circumstances under which a pact is formed represent the same ingredients symbolized in express contracts by words. Quasi contracts, however, are accompanied by no convention, and cannot be contracts at all. In general terms, we may account as follows for the origin of the theory: Men sought to establish a hypothesis competent to prove that political rights and duties rest upon convention. Where such a convention has not laid down obligations, men cannot be legally bound; in fine, that he who is bound has given a promise, and *vice versa*. The "political or civil contract," and the "social compact," rest on different foundations, one being formed in society, the other anticipating it. Advocates of the former scout the theory of a conventional origin of society and government from the so-called state of nature.[6] They prefer to view the reciprocal rights and duties of sovereign and subject as practical questions. It is true, they classed these mutual relations under the general law of con-

[1] Zallinger, Inst. Jur. Nat. et Eccles. Publ. lib. 3. Cap. I, § 196.
[2] Pufend, Droit des Gens. liv. 7, ch. 2, § 8, note 2.
[3] Blackstone, Com., b. 1, p. 47.
[4] G. Bowyer, Universal Public Law, p. 57.
[5] Austin, Lectures on Jurisprudence. Vol. 1, p. 331, note 2.
[6] Brownson, The American Republic, pp. 43-45.

tracts, but they were satisfied in believing the "original contract" to be founded on divine law, given directly or indirectly to men. Every man, they claim, has a natural right to "life, liberty and property," and the only question to be solved is whether either party has broken the law of nature, and consequently, the contract.

In criticism of this theory, we note that divine law, positive law, and positive morality, are amply sufficient to account for the mutual obligations of subject and sovereign, without reverting to the notion of contract.[1] On this principle, each subject has legal, moral and religious duties imposed upon him; and a sovereign, moral and religious duties. Legal duties are created by the sovereign, and subservient to positive law. If a ruler govern for the public good, then each subject becomes religiously bound to obey him, *i. e.*, the general good which would follow obedience must not be subservient to the specific good, which might accrue from disobedience. Moral duties embrace that ethical sphere which positive morality has imposed upon men. Excluding, of course, legal duties, the sovereignty in its relations with subjects, must consider itself bound by the same obligations. If a commonwealth were dissolved at the present day, we should find the process of reconstruction based upon subservience to one or more of these obligations. The duties and rights recognized by the new state must be rooted, not in contract, but in the nature of man himself.

Many political thinkers, not satisfied with the idea of a political contract, have gone still deeper in their theorizing, and have sought the origin of all legal obligation in an original social compact. They proceed on the following lines.[2] We first suppose the inchoate citizens assembled, containing jointly within themselves all the political forces necessary for the establishment of a state, and possessed of free will. Viewed from the potential agreement of each with all, and *vice versa*, the act of institution may be termed an "original covenant." If we consider it from the standpoint of the formation of the

[1] Austin, Lectures on Jurisprudence. Vol. 1, pp. 307-308.
[2] Austin, Lectures on Jurisprudence. Vol. 1, pp. 309-11.

future state, we may call the act a "fundamental civil pact." We note three stages in the process of formation:

a.—Pactum unionis; i. e., a resolution to join and form a state, upon the basis of some dominant end which represents to the mind of each contractor, by its universal reception, the best interests of society. This may be supplemented by the addition of subsidiary ends. The nature of such ends depends, of course, upon the ethical principles on which different exponents of the theory base their political systems. Happiness, security, peace, immutable justice, seem to be the ends generally adopted.

b.—Pactum constitutionis. At this point the inchoate citizens fix upon a constitution for the new state, and determine the individual or individuals in whose hands the sovereign power shall be vested. Pufendorf views this as a mere ordinance power lying between two contracts.[1]

c.—Pactum subjectionis. This represents the final stage of the process. The inchoate citizens, the dominant end, together with the subsidiary ones, if there be any, and the proposed sovereign, have now become actualities. Nothing is needed but to clinch the pact by a series of promises. The dominant and subsidary ends under which the new society is to act therefore become the basis upon which such promises are made. Finally, the sovereign promises to rule his subjects, and the subjects promise to obey the sovereign, subservient in both cases to the end or ends for which the society was instituted. It will be seen that the first two steps are rather of the nature of resolutions, and introductory to the real contract. In the last stage of the process, we notice that the dominant and subsidiary ends have become the foundation of the compact, and sovereignty ceases to be legally such when its actions do not reflect those ends. This contract is binding on succeeding generations, and furnishes, as we have already seen, the basis for subsequent legal obligations. The state thus formed be-

[1] Pufend, Devoir de l'Homme et du Citoyen, liv. 2, cap 6, § 7–10. Pufend, Droit des Gens, lib. 7, ch. 2, § 7–8.

comes a juristic person, distinct from each and every one of the contractors. It has its own name, rights, and property, separate and distinct from that of each subject. In fine, we see in it a compound, moral personage, whose will must necessarily be directed towards the attainment of certain ends, for the preservation of which it owes its existence.

CHAPTER II.

HOOKER, in his *Laws of Ecclesiastical Polity*, published 1594, attributes the origin of society to compact. Before his time, political thinkers had not systematically treated this theory, though the revival of the Justinian Code imbued their minds with contractual notions as to the origin of the state.[1] In order to understand Hooker's conception of this theory, a glance at certain of his ethical doctrines is necessary. He conceives of goodness as that perfection which all things desire to attain.[2] Now, the essence of human nature is to desire continuance of being and a resemblance to God. Man at first possesses simply potential knowledge, which may be considered both sensible and spiritual. He, in contradistinction to brutes, being a free moral agent, can attain to both; knowledge and will are thus the fundamental principles of human action. Man's great desire being for goodness, the latter may be better attained through observing its accompanying signs, than by seeking to inquire for the cause of such goodness.[3] We find, therefore, that the most certain test of goodness consists in general consent obtained through the teachings of nature, and consequently, from God himself.[4] Law is that which reason defines to be good that it must be done. This reason may be regarded as human nature itself, embodied in the form of general consent.[5] Hooker finds the law of reason marked by the following characteristics: (*a*) regularity, imitating thereby the action of nature itself; (*b*) a possibility of being investigated by reason alone, without divine assistance; (*c*) the knowledge of those things which may be termed general.[6] Now, there has

[1] *Atlantic Monthly*. June, 1887, p. 751.
[2] Ecclesiastical Polity, Bk. I., Ch. V, Sec. 2.
[3] Ecclesiastical Polity, Bk. I., Ch. VII, Sec. 2.
[4] Ecclesiastical Polity, Bk. I, Ch. VIII, Sec 2.
[5] Ecclesiastical Polity, Bk. I, Ch. 8, Sec. 9.
[6] Ecclesiastical Polity, Bk. I, Ch. 8, Sec. 9.

been no time in man's existence when he was not dominated by the law of reason or nature. We see, then, that such a law is absolute, binding men whether within or without society. As regards society, its foundations must be sought in a natural inclination for such, and a plan of union agreed upon by all the inchoate citizens. Hooker sees a natural weakness in man, driving him into society through the lack of those necessities and comforts which society alone can afford. This, however, is but a secondary consideration. Men do not conform to the infallible guidance of natural law, consequently, they must seek the aid of society. In their search after what is good, reason and valor, the gifts of nature to every individual, induce men to oppress and defraud one another. As a natural result, society must be established, or the human race perish. "To take away all such mutual grievances, injuries, and wrongs, there was no way, but only by growing unto composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto; that unto whom they granted authority to rule and govern, by them the peace, tranquility, and happiness of the rest might be procured."[1] Paternal and kingly government he considers to be radically different. A father rules his family by a natural right, but kings rule their subjects by (*a*) force, and then unlawfully, (*b*) the immediate appointment of God, (*c*) consent of men. Hooker insists upon the last view, maintaining that "all public regiment, of what kind soever, seemeth evidently to have risen from deliberate advice, consultation, and composition between men judging it convenient and behoveful, there being no impossibility in nature considered by itself, but that men might have lived without any public regiment."[2] The pact may not have immediately preceded civil law; in fact, he thinks it likely that monarchs ruled originally by mere prerogative. The miseries inflicted upon the subjects on account of this irresponsibility induced them eventually to circumscribe his power. In basing government upon the consent of the governed, Hooker seems

[1] E. P. Bk. I, Ch. X, Sec. 4.
[2] E. P. Bk. I, Ch. X, Sec. 4.

to have been the first to deduce the lawfulness of laws from a voluntary association of individuals.[1] An agreement having been once made that rulers should make laws for the people, it is not necessary to revert to the original covenant at the making of every new law. "To be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after, by the like universal agreement. We were then alive in our predecessors, and they in their successors do still live."[2] He thus conceives of a contract between the people and an hereditary line of kings. It is hardly necessary to add that private contracts fail to account for the origin of public law and a national will.

We proceed to review the social compact, as expounded by Hobbes and Locke in England, and Rousseau in France. It will be convenient to discuss their respective opinions under the following heads: 1, the state of nature; 2, the compact; 3, sovereignty; 4, government.

I.—*The State of Nature.*

Hobbes views men in a state of nature as having mental and physical forces so equally bestowed, that, for all practical purposes, every pre-social man may be considered equal to every other. Such an individual will naturally seek good for himself, ignoring any distinction between "*jus*" and "utile." Gifted with many passions, which are natural, not unjust, before society takes its inception, he will apply himself to the accomplishment of certain ends for his own pleasure or preservation. The fundamental proposition upon which the execution of these ends rests is found in the assertion that "every man by nature hath right to all things; that is to say, to do whatsoever he listeth, to whom he listeth, to possess, use and enjoy all things he can and will."[3] Men, therefore, in the state of nature have an universal right to all which they can seize and

[1] *Atlantic Monthly.* June, 1887, p. 751.
[2] E. P. Bk. I, Ch. X, Sec. 9.
[3] De corpore politico. Pt. I, Ch. 1, §10.

hold, even to the extent of the persons of their fellow-men; in fact, irresistible might makes right. It will be readily seen that in the attainment of their several ends a continual clashing of interests would be inevitable among the inchoate citizens. He who has seized property must be prepared to battle continually for its possession. In such a state, force and fraud, anticipation and diffidence, dominate the race. One man will seek possessions sufficient merely for the preservation of life; another will aim at universal dominion; a third, for the praise of men. "So that in the nature of man we find three principal causes of quarrel: first, competition; secondly, diffidence; thirdly, glory."[1] Originally, as each man had the natural right to pursue certain ends, so he also possessed the right of judging and consulting the means best conducive to the performance of these ends. No conception of *meum* and *tuum* entered his mind. First-seizing and occupancy supplied their place. The natural consequences of such a state of existence Hobbes summarizes thus: "Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war, as is of every man, against every man."[2] In such a state, the idea of justice can find no place; for, like the conception of property, its sphere of operation is confined to the Commonwealth duly instituted. This miserable condition of warfare being destructive to the human race, the only means of withdrawing from the state of nature into that of society must be found in men's passions and reason. Fear of death, implanted in the breasts of the most degraded, would therefore suggest peace; and reason immediately furnishes the necessary articles. These articles of peace comprise the laws of nature, being "precepts or general rules found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may best be preserved."[3] He thus bases the law

[1] Leviathan, p. 64. (Morley's Universal Library).
[2] Leviathan. P. 64.
[3] Leviathan. P. 66.

of nature upon reason; not upon the consent of nations or of all mankind.[5] Its two fundamental laws are that men seek peace, and in case it cannot be obtained, defend themselves in every way possible. When summarized, the law of nature reads: "Quod tibi fieri non vis, alteri ne feceris." This may be considered an infallible guide to all who desire to ascertain what the law of nature is. Natural law binds only "in foro interno," *i. e.*, to a desire that it should be followed. To throw one's self upon the promises of an adversary, with no appeal to a higher tribunal in case the latter should fail to execute his promise, Hobbes considers suicidal. The state of nature is, therefore, one of war, not necessarily a continual conflict, but that pre-social period when men, through the need of some superior tribunal, display the mental or physical attitude of distrust. As a proof that such a state of nature once existed he cites the belligerent attitude of nations towards each other, even in periods of peace; and also the precautions taken by individuals in society against force and fraud. While willing to concede that a general state of war never existed, Hobbes maintains that the present social condition of many barbarous tribes is practically the state of nature and war.

Locke considers the state of nature one of perfect freedom, limited only by the fact that a man must perform every action in subservience to the law of nature. Perfect equality is one of its fundamental principles, yet we must not look upon it as a state of license. A moral obligation rests upon every man to preserve himself, and also the rest of mankind as far as may be conducive to his own welfare. Now, the law of nature "willeth the peace and preservation of mankind."[6] Every man in the state of nature has a right to execute this law, dominated, however, by reason and a sense of humanity. The transgressor of the law of nature is really an enemy of the human race, preferring to live by some other law than that of equity; consequently he may be destroyed as any noxious animal. Against the objections of those who deny the exist-

[5] De corpore politico. Pt. I, ch. 2, § 1.
[6] Two Treatises of Government. Ch. II, § 7. (Morley's Universal Library).

ence of a state of nature, Locke cites the relations of states to aliens and other states, which are conducted upon the principle of mutual independence. In fact, the state of nature, apart from historical presumptions in its favor, exists among civilized communities. "For it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another and yet still be in the state of nature, and I affirm that all men are naturally in that state, and remain so till, by their own consents, they make themselves members of some political society."[7] The temporary absence of any legal authority, to whose decision a case might be submitted, leaves the two parties in a state of nature until the obstacle be removed. We see then that Locke does not consider this pre-social state as an abstraction preceding society itself, but a necessary concomitant of the same.

Again, Hobbes makes the state of nature identical with that of war; Locke, on the contrary, distinguishes these conceptions: "The state of nature and the state of war are as far distinct as a state of good will, mutual assistance and preservation, and a state of enmity, malice, violence, and mutual destruction."[8] In the former case we note a condition where men live together under the guidance of reason, with no superior power to judge among them. The state of war naturally succeeds this where one man exerts or designs force against another. Hobbes evolves all his social conceptions from the fundamental principle, "natura dedit omnia omnibus."[9] Locke insists that every man always possesses an exclusive property in his own person. He thus carries the idea of property back to the pre social state. Man in this condition may remove nature's productions from their natural state, "by mixing his labor with them, and joining to them something that is his own."[10] These, *ipso facto*, become his

[7] Two Treatises of Government. Ch. II, § 14, 15.
[7] Two Treatises of Government. Ch. III, § 19.
[8] De corpore politico. Pt. I. Ch. I, § 10.
[9] Two Treatises of Government. Ch. V, § 27.

property without obtaining the consent of any fellow-man. Yet the extent of such appropriation must be in conformity to the law of reason and the natural wants of each individual. The law of nature, which gives to every man a property right, has also fixed a limit to acquisition. If he allow the fruits of his toil to rot, the law of nature is transgressed, and the rights of his fellow-men ignored. In fine, property does not find its origin in the social pact, but has always existed as one of the prime factors of man's existence.

If Hobbes places the state of nature upon a basis unhistorical and abstract, Rousseau makes the same more absurd by his fantastic description of the primitive man. He finds two species of inequality existing among men—physical and political; the former based upon the varying age and strength of individuals, the latter taking its inception from convention. With the physical evolution of the human body Rousseau does not concern himself. He is satisfied with viewing its complete development as exemplified in history, and only aims to sketch the political side of man's existence from that period when his body was akin to that of the brute creation, and its functions, entirely or chiefly, animal. Such a being he proceeds to describe: "Je le vois se rassaisiant sous un chêne se désaltérant au première ruisseau, trouvant son lit ou pied du même arbre qui lui a fourni son repas & voilà ses besoins satisfaits."[1] Contrary to Hobbes, he maintains that presocial men are not warlike, but averse to combat, if not positively timid. Possessing no property, and satisfied with the spontaneous fruits of the earth, man wanders to and fro, devoid of intelligence and speech. "Les seuls biens qu'il connoisse dans l'univers sont la nourriture, une femelle & le repos."[2] In such a state, his body becomes robust through frequent and necessary exercise. He braves the elements, exposed, yet not susceptible to their rigor. The only things he fears are pain and hunger, and at the close of life passes off the stage unnoticed, himself even oblivious to the change. But we also find in man "perfectibilité,"[3] *i. e.*, the possibility

[1] Discours sur l'origine, &c., p 48. (Geneve, 1782.)
[2] Discours sur l'origine, &c., p. 60.
[3] Discours sur l'origine, &c., p. 58.

of improvement, a source of subsequent slavery and social inequality While nature itself furnishes the means and end for animal existence, man, as a moral agent, can choose and refuse. This may exist only as a latent force in the primitive man, yet it furnishes a bridge by which mere sensations may pass over to rudimentary knowledge. "Appercevoir & sentir fera son premier état, qui lui fera commun avec tous les animaux. Vouloir & ne pas vouloir, desirer & craindre, seront les premieres & presque les seules opérations de son ame, jusqu' à ce qui de nouvelles circonstances y causent de nouveaux, développemens."[1] His first act was to compare and contrast himself with beasts, thereby rousing into action the rational faculty, his moral nature still lying dormant. The terms good or bad may be applied, but only in a physical sense, as they work towards or against self-preservation.

Hitherto we have regarded man as isolated. The conjunction of the sexes is implied, but viewed from a purely physical standpoint. With the development, however, of this discriminative faculty, men were led to single out the objects of their desire, dominated now by the sense of beauty or attractiveness. Passions other than the animal begin to exert an influence in the human breast. "Les premiers développemens du cœur furent l'effet d'une situation nouvelle qui réunissoit dans une habitation commune, les maris & les femmes, les peres & les enfans."[2] We note that Rousseau confines the state of nature to that period when man lived independent of society, subject only to animal functions. Between this state and the formation of the compact he describes a semi-social condition, while the faculty of improvement was developing. To this faculty he attributes all past and present evils in society. "Il seroit triste pour nous d'être forcés de convenir que cette faculté distinctive & presque illimiteé, est la source de tous les malheurs de l'homme."[3] Now, successful domination over animals produces in the pre-social

[1] Discours sur l'origine, &c., p. 59.
[2] Discours sur l'origine, &c., p. 92.
[3] Discours sur l'origine, &c., p. 58.

man a feeling of pride. The comparative faculty being once stimulated, he begins to examine the actions of his fellow-man, and sees in them simply a reflection of his own. Men were thus drawn into loose confederations, with the mutual object of self-preservation, but gifted with no more means of intellectual union than an assembly of jackdaws or monkeys. Brute force must suppress any attack upon the natural instincts of pleasure and pain which all possess. This condition serves as an introduction to rude family life. Compassion, an intuitive principle within the human breast, supplies the place of law. This compassion is the more reliable, because it lacks that selfish turn which it often receives at the hands of men in society. As a result of social tendencies displayed in family life, the economy of nature becomes disturbed. Men are no longer willing to live a passive life. "Ces premiers progrès mirent enfin l'homme à portée d'en faire de plus rapides. Plus l'esprit s' éclairont & plus l'industrie se perfectionna."[1] More leisure is afforded through invention. The use of tools causes a physical degeneration in the race, while a knowledge of metallurgy and agriculture become indispensable. Equilibrium cannot be maintained on account of these varying factors of man's existence; hence social inequality manifests itself. Meanwhile, through rude family life, the use of language becomes absolutely necessary; starting first in the form of outcries and gestures between mother and child, to express varying desires and emotions, developing gradually into a complete terminology. Men are now sufficiently advanced to build rude cabins and cultivate the ground in their immediate vicinity. As the earth becomes cultivated, higher conceptions as to property and society take their rise. "Le premier qui ayant enclos un terrain, s'avisa de dire, ceci est à moi & trouva des gens assez simples pour le croire fut le vrai fondateur de la société civile."[2]

This, strictly speaking, closes Rousseau's conception of the state of nature; but, for the sake of completeness, we trace man's progress up to the formation of the fundamental pact. Even

[1] Discours sur l'origine, &c., p. 92.
[2] Discours sur l'origine, &c., p. 87.

after men have stamped the results of their labor upon property, no right to it yet exists, except that of first occupancy or actual possession. Disproportion is a natural result. "Ils avoient beau dire c'est moi qui ai bâti ce mur; j'ai gagné ce terrain par mon travail. Qui vous a donné lés alignemens, leur pouvoit on répondre."[1] So men began to depend upon each other as well as upon nature. It became now a man's interest to appear what he was not; hence cunning, arrogance, and violence arise. Natural compassion is stifled, and a state of bloody warfare ensues; the rich using every artifice of fraud and flattery to hold their possessions, the poor, while their slaves, ever on the alert to dispossess them. Finally, the rich see that their titles are precarious, and seek to employ natural enemies to their own advantage. They portray to the poor, through a representative, the mutual advantage of law and peace. Men, weary of strife, lend a willing ear, and the pact is formed.

II.—The Compact.

Starting from his fundamental proposition, "natura dedit omnia omnibus," Hobbes considers that the social compact must be based upon the second law of nature, *viz.*: "That a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men, as he would allow other men against himself."[2] To lay down a right is simply to divest one self of the natural liberty of hindering another in his effort to obtain the same right. Note that renunciation of rights cannot create new ones, so that we must not expect to find new rights created by the fundamental pact. The pre-social man who surrenders any right to another simply removes one of the impediments to his natural right to all things, which the latter encounters in the state of nature. Contract is the "mutual transferring of rights."[3] Now, men enter the social

[1] Discours sur l'origine, &c., p. 105.
[2] Leviathan, p. 66.
[3] Leviathian, p. 67.

compact for some good to themselves; consequently, certain rights, from their very nature, cannot lawfully be transferred. To covenant not to defend myself against force, to accuse myself, or yield voluntarily to slavery, are, *ipso facto*, null and void, since such rights cannot be surrendered. The desire for self-preservation and the fear of death induce men, who naturally love dominion, to subject themselves by compact. Covenants, however, without a coercive power, are mere words. Neither laws of nature, nor the mechanical union of men, can establish a body politic. The only way for security is "to confer all their power and strength on one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, to one will."[1] We must, then, consider the state of nature as lasting until the desired security is obtained, not merely until the framing of the pact. Men looking towards the formation of society are influenced by (*a*) the consent or concurrence of many wills towards one and the same end, and (*b*) a mutual and common fear of death. The subsequent union consists in this, "that every man by covenant oblige himself to some one and the same man, or to some one and the same council, by them all named and determined to do those actions, which the said man or council shall command them to do, and to do no action which he or they shall forbid or command them not to do."[2] Granting, that a multitude of men have assembled with the fixed view of forming a state and obtaining thereby external and internal security, each individual has still a natural right to all things. Every man, then, must consent in the first place to something by which all may come nearer to the desired end. Each, therefore, contracts with all, both collectively and individually, to allow the will of the inchoate sovereign person, or the majority of wills of the inchoate sovereign assembly, to be the general will. The body politic thus instituted must be considered absolute and eternal, established for the perpetual benefit and defence of its constituents. It consists "in the power and the strength that every of the members

[1] Leviathan, p. 84.
[2] De corpore politico. Pt. I., Ch. VI., § 7.

have transferred to him from themselves by covenant."[1] We have seen that to transfer power and strength means simply to lay aside the natural right of resistance. As much power must be surrendered as may be necessary for the common security, and no more. Thus the covenant passes between the people, and not between subjects and sovereign. The reason for this is apparent. A sovereign cannot contract with the whole body, for the latter is not then a person; and if he should contract with each individual, such a pact, when the state is formed, would become null and void, because then the actions of the sovereign are considered the actions of each and every one of the contractors. The body politic practically dates its existence from the establishment of a coercive power, for the will of most men is governed by fear, and a lack of coercion generally brings lawlessness. This power of coercion means simply the transfer of a man's natural right of resistance to that person or assembly in whose hands he has contracted to place it.

Locke's conception of the compact is based upon the proposition that, all men being born free and equal, they cannot enter society, except by their own consent. The enjoyment of property in the state of nature is insecure, and constantly open to attacks. Property itself may be summed up in "life, liberty, and estate." We naturally assume that men would be forced into society, not mainly for the purpose of acquiring legal rights, but to protect and preserve the property belonging to them in a state of nature, and to avoid perpetual warfare, an inevitable necessity to those remaining for any length of time in a pre-social state. Locke's view of the compact is both practical and simple. Individuals enter society only through such a pact, but it may be either tacit or express. He marks the first notion of a social pact in conjugal association, established to procreate and preserve offspring. Political and paternal governments, however, rest on different foundations. A father is morally bound to care for his children, but this furnishes no basis for a legal government over them when they

[1] De corpore politico. Pt. 1, Ch. 6, § 10.

have reached maturity. Children may waive their natural rights and submit tacitly to parental control, even after this period. Sooner or later, however, a legal basis for the inchoate state becomes necessary, and this can only be established through compact. Such a pact consists merely in the consent of any number of inchoate citizens, and "when any number of men have so consented to make one community or government, they are thereby presently incorporated and make one body politic, wherein the majority have a right to act and conclude the rest."[1] Man in society has surrendered two rights which belonged to him in a state of nature, (*a*) the power of doing whatever he thought conducive to the preservation of himself and others, (*b*) the right of punishing, in accordance with the law of nature, the crimes committed against that law; the former he surrenders to the legislative, the latter to the executive, power of the new state. Refuting those who deny the existence of any social pact, Locke cites cases from Spartan and American history as indicating that all states have arisen from the general consent of contracting individuals.[2] He is not satisfied, however, with leaving the theory here, but affirms that the present continuance of a state depends upon the use of a fundamental pact. Man, thus being by nature free, his children must be also free, and therefore in a state of nature, until they attain to the necessary age for entering as members into the commonwealth. "Those who would persuade us that by being born under government, we are naturally subjects to it, have no other reason to produce for it, but only because our fathers or progenitors passed away their natural liberty, and thereby bound up themselves and their posterity to a perpetual subjection to the government which they themselves submitted to."[3] It is true that, to inherit the father's property, the son must consider himself bound to that state in which the said property lies; but ignoring such considerations, he is under no legal obligation to remain in his native state. Accordingly,

[1] Two Treatises of Government. Ch. VIII, § 96.
[2] Two Treatises of Government. Ch. VIII, §102, 103.
[3] Two Treatises of Government. Ch. VIII., §116.

he may either enter another, through the usual pact, or agree with individuals to found a new one "in vacuis locis."

Rousseau, as we have seen, finds that the last stage of the pre-social state, so fruitful in anarchy and bloodshed, induces the rich, who had little to gain and all to lose, at the hands of their poorer companions, to advocate convention and society. First of all it is necessary to secure unanimity. If any man oppose the pact, such an one is not to be considered a member of the state so formed. On the other hand, he who dwells within the territory of the inchoate state, and fails, through negligence or inability, to join in constituting the pact, must be reckoned a tacit contractor. Society, however, being once established, a majority of votes can legally bind each sovereign subject. Rousseau's whole aim is to show that convention can be the only legal basis of society. One man has no natural or hereditary right over another; still less can force shelter itself behind a legal claim. Men are induced to contract, in order that the human race may be saved from annihilation. The aim, therefore, of the social compact, is to preserve, not to enslave society. From the nature of such a convention, we infer that no stipulations can be made respecting absolute authority on the one hand, and passive obedience on the other; since no act can bind the sovereign power. Taking men as they existed in the state of nature, Rousseau considers that new social forces cannot be obtained from any combination or aggregation to which they may subject themselves. Society, at best, can furnish but a maximum of individual forces. Compact must rest upon the two chief factors of man's preservation, equality and force. The problem for each inchoate citizen to solve is as follows: "Trouver une forme d'association qui défende & protege de toute la force commune la personne & les biens de chacque associé, & par laquelle chacun s'unissant á tous, n'obéisse pourtant qu'à liu-même & reste aussi libre qu'à auparavant."[1] These articles are fixed and axiomatic. The pact once broken, each sovereign subject returns to the state of

[1]Du contrat social. p. 203. (Geneve 1782).

nature. Reducing it to a single term, the pact involves "l'aliénation totale de chacque associé avec tous ses droits à toute la communauté."[1] To such an alienation, then, there can be no reserve, yet the pledge is to all, not to one, or many individuals; not one-sided, for each contractor receives an equivalent for what is surrendered. To summarize, "chacun de nous met en commun sa personne & toute sa puissance sous la suprême direction de la volonté générale, & nous recevons en corps chacque membre comme partie indivisible du tout."[2] A contract of each with all being once consummated, that moral, collective person, which we term the state in its static, and the sovereignty in its dynamic capacity, becomes the necessary resultant. We find an unity of life and will, previously unknown, running through the newly formed organism. Justice takes the place of instinct, acts become clothed with moral significance, and the sense of duty supplants that of impulse; in fact, each individual sees it necessary to consult the reason, rather than the propensities of nature. It is true, he loses by the compact that right to everything which tempts him, the chief feature of the state of nature, but he gains what is more enduring, civil liberty and a legal right to all that he possesses. Property is surrendered to the state, or rather the latter seizes it, yet for the sole object of securing it by a positive title. On account of the civil and moral liberty obtained through compact, the individual may be said to acquire all he gives up. The pact, then, is not one between an inferior and superior, or one between an individual and the remaining members of the association, but one between the body and each of its members, "équitable, parce qu'elle est commune à tous; utile, parce qu'elle ne peut avoir d'autre objet que le bien général & solide parce qu'elle a pour garant la force publique & le pouvoir suprême."[3] By the terms of the social pact, it will be seen that each sovereign subject obeys no person but simply his own "proper will," the true conception of which must be found in the covenant of each with all, and all with each.

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[1] Du contrat social, p. 203.
[2] Du contrat social, p. 204.
[3] Du contrat social, p. 223.

III.—Sovereignty.

According to Hobbes, sovereignty may be lodged in one, few, or many. His sympathies evidently run towards monarchy, though democracy and aristocracy were probably its precursors. We can conceive of sovereignty as the result of a gradual centralization of powers, working from the unrestrained right to all things, which each individual, in the state of nature, possessed, to the centralization of all those rights which can be surrendered by compact, in the hands of a sovereign person or assembly. The sovereign is thus: "One person, of whose acts a great multitude, by mutual covenants, one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence."[1] Once constituted, the sovereign is literally a "mortal god." Henceforth subjects can make no new covenant without the sovereign's consent, nor cast off his authority and return to a state of nature as long as he is able and willing to protect them. As the people's author, his acts become the people's acts. To depose the sovereign is simply to take from him that which by compact is his own; and any man who perishes in an attempt to overthrow sovereignty becomes thereby the author of his own punishment. A sovereign may commit iniquity, but not injustice, while acting in his official capacity, since each act is then performed by the will of every particular man. "If, therefore, they style it injury, they but accuse themselves. And it is against reason for the same man both to do and complain; implying this contradiction, that whereas he first ratified the People Acts in general, he now disalloweth the same of them in particular."[2] As God's vicegerent, the sovereign acts under the jurisdiction of divine law, which Hobbes considers equivalent to the law of nature.[3] He cannot, then, be amenable to any earthly tribunal. Sovereignty was established for "the safety of the people," having its roots in the passions of men; "but by safety here is not meant a bare preser-

[1] Leviathan, p. 84.
[2] De corpore politico. Pt. II, Ch. II, Sec. 3.
[3] De corpore politico. Pt. II, Ch. X, Sec. 7.

vation, but also other contentments of life, which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself." [1] The way and means of protection must then be granted to the sovereign, and though his irresponsible acts may work to the disadvantage of a few, yet how much more endurable these petty grievances than the war and rapine of a state of nature! We infer, then, that the rights of property, judicature, legislation, peace and war, punishments and rewards, are inherent in the sovereign; in fine, the swords of justice and war. But the subject has rights which cannot be transferred by any pact. Men enter society simply for protection, and the sovereign cannot frustrate the end for which the commonwealth was formed. A subject may legally refuse to maim himself, confess a crime, kill himself or a fellow-being. These are forbidden by the law of nature, and to it the sovereign is amenable. Hobbes thinks that the social pact, though originally destined to be eternal, may be dissolved, and the dissolution afford each individual previously subject to it a legal right to enter another commonwealth. Thus the obligation resting upon a subject can only last while the sovereign power protects. Men have a natural right to protect themselves when the commonwealth fails to do so. The end of obedience is protection. If a sovereign voluntarily relinquishes his power, ceases to protect his subjects, or submits to a foreign enemy, the commonwealth is dissolved, and each citizen returns to the state of nature. The latter may contract with a conqueror, voluntarily or through fear. In this case he becomes a citizen of the new state. Failing to contract, he continues a slave, and may effect his freedom by any means subservient to natural law.

With respect to civil law the jurisdiction of the sovereign is supreme. To him belongs the assignment of lands, and since property was always the creature of society, no right to the same can exclude that of the sovereign. The latter may also make and repeal civil laws, appoint magistrates, ministers and judges; in fact, may perform any act which another in

[1] Leviathan, p. 153.

the commonwealth cannot do. "To sovereign power, whatever it doth, there belongeth impunity."[1]

Note that the subject does not give the sovereign a right to punish, but simply lays down his own right to do so. This affords the latter a right, both collective and general, to all things within the jurisdiction of the state, and makes his acts lawful. On the contrary, those of an usurper are hostile, being simply the acts of an individual. Hobbes traces the origin of the state, whether by institution or acquisition, to a compact based upon fear of death. In the former case it is a fear of death "de futuro," in the latter a fear "de presenti." Sovereignty once established, the good of monarch and that of the subject become identical. A ruler who ignores the natural and divine law, "salus populi suprema lex," will ultimately lose his official capacity by the dissolution of the state and a return to the articles of the social pact.

After the compact is formed, Locke places the sovereignty in the hands of the people. By the people we must here understand the political people, not the whole body of citizens. This seems to have been the first recognition of the modern doctrine of popular sovereignty. Now, the sovereign body so constituted may delegate its legislative power to one, few, or many. For practical purposes we may consider the legislature as sovereign, being "the supreme power of the commonwealth."[2] Locke, however, is careful to maintain that when the legislature acts contrary to its trust it may be dissolved; for society has always a right of self-preservation, which, by the law of nature, can never be alienated. "Thus, the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."[3] As a result of the pact, each individual contributes a certain power to society, which can never revert to him as long as the state continues to exist.

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[1] De corpore politico. Pt. II, ch. 1, § 12.
[2] Two Treatises of Government. Ch. XI, § 134.
[3] Two Treatises of Government. Ch. XIII, § 149.

The political power thus surrendered by each individual is ceded by the sovereign people to the legislature, either forever or for a fixed period. In the former case the legislative power can never again revert to the people as long as government lasts, though it may do so without the dissolution of society itself. On the contrary, if the sovereign people have fixed a limit to its existence, at the termination of the same the legislative power comes again into their hands, and they may decide to retain it permanently; or re-delegate it, changed as to person or form, and even in both these respects. In case of a dispute between the people and the legislature or prince, Locke finds the final appeal on earth in the "sovereign people," and to its decision both parties must submit, or else a dissolution of the commonwealth, with consequent anarchy, becomes an inevitable result.

As a result of the social pact, each citizen possesses a two-fold personality; being an integral factor of the sovereignty, and also subject to the same. This sovereignty Rousseau calls the "general will." It is of such a nature that it cannot be bound by any law, not even by that of the pact itself. We must look upon it as a will, moving under general impulses, with no interest contrary to that of the common good, and necessitating no guarantee for the performance of its present or future actions. As long, then, as the "general will" exists it must be a perfect organism. "Si tôt que cette multitude est ainsi réunie en un corps, on ne peut offenser un des membres sans attaquer le corps; encore moins offenser le corps sans que les membres s'en ressentent."[1] Individuals, on the contrary, have simply a private will, and as such, cannot agree with the general will on every point. Admitting these wills are now identical, their future agreement becomes merely a matter of chance. We know, however, that the general will, as long as it exists, will have the general good in view. This it cannot alienate. It follows, naturally, that a subject who disregards the general will, does not exert his own proper will. No state can rest upon a firm foundation

[1] Du contrat social, p. 206.

which does not attach a sanction to the former will; "que quiconque refusera d'obéir à la volonté générale y fera contraint par tout le corps: ce qui ne signifie autre chose, sinon qu'on le forcera d'être libre."[1] The general will may delegate its power, but not the will itself.[2] Now, the people, from the terms of the pact, cannot promise to obey unconditionally. Such a promise would be a limitation inconsistent with sovereignty. As long, however, as the government exists, its decrees must pass for the general will. Rousseau considers a majority of citizens' votes as the practical expression of this will, but with the following limitation: "Pour qu'une volonté soit générale, il n'est pas toujours nécessaire qu' elle soit unanime mais il est nécessaire que toute les voix soient comptées; toute exclusion formelle rompt la généralité."[3] He carefully distinguishes the will of all, and the general will. The former implies merely a collection of individual wills, and though it may be general from a numerical standpoint, the will is private as regards the mental attitude of its constituent factors. Men may be deceived, but in their true political capacity can never be corrupted. The tendency of many partial associations is to make one dissentient whole. "Il importe donc pour avoir bien l'énoncé de la volonté générale qu'il n'y ait pas de société partielle dans l'Etat, & que chacque citoyen n'opine que d'après lui."[4] The general will then, acts as a public, not a private person. From the nature of such a will there can be no inclination to impose unjust burdens upon the people under its jurisdiction. The engagement of each with all creates mutual obligations. As a natural result the general will can have no private views, since common interest, not any fixed number of voices, is its essential characteristic. To enter into a private application of the general will would be a magisterial, not a sovereign function. "Tout acte de souveraineté, c'est-à-diré, tout acte authentique de la volonté générale oblige ou favorise égale-

[1] Du contrat social, p. 208.
[2] Du contrat social, p. 214.
[3] Du contrat social, p. 216.
[4] Du contrat social, p. 219.

ment tous les citoyens."[1] This personification of sovereignty would not, however, lead us to agree with him in considering subjects as obeying no person, but simply their own proper will.[2]

Again, sovereign power, though essentially unlimited, cannot exceed for any length of time the bounds of convention. Men in society have still, nominally, extra-contractual rights. The surrender of property at the formation of the pact does not imply its renunciation, but simply an advantageous transition. A subject may be called upon to defend the sovereignty, but not as an individual. This is a fair bargain; for he only occasionally performs that service for the state which he was compelled to do continually on his own behalf, in the pre-social condition. "Tout homme a droit de risquer sa propre vie pour la conserver."[3]

In the matter of punishment, the general will makes laws. These are not private acts, not contracts between all the people except the criminal, and that criminal; such relations would necessarily be private. On the contrary, all the people must determine for all the people.[4] A malefactor ceases to will the law, and either he or the state must perish. Such a man suffers, therefore, as an enemy in the state of nature, not as a citizen; in fine, the law views its subjects collectively, and their acts abstractly.[5]

Rousseau finds the supreme good of the state in liberty and equality.[6] Laws which are simply the general will, in action must conform to these fundamental principles of man's existence. The legislative power is the special birthright of the people, and sovereignty can never speak ultimately except the people be assembled. "On peut dire en général que plus le Gouvernement a de force, plus le Souverain doit se montrer fréquemment."[7] To counteract this tendency, sovereign as-

[1] Du contrat social, p. 223.
[2] Du contrat social, p. 224.
[3] Du contrat social, p. 225.
[4] Du contrat social, p. 229.
[5] Du contrat social, p. 229.
[6] Du contrat social, p. 247.
[7] Du contrat social, p. 296.

semblies ought to be convened at stated times in different parts of the country. Two questions should then be put, and receive the assent of a majority of the citizens: (*a*) "S'il plâit au Souverain de conserver la présente forme de Gouvernement; (*b*) S'il plâit au Peuple d'en laisser l'administration à ceux qui en sont actuellement chargés."[1] The rejection of the latter proposition means revolution; that of the former, a return to the first article of the pact, *i. e.*, social dissolution.

IV.—Government.

Hobbes considers government under the name of the body politic, whose power of representation must always be limited by the sovereign person or assembly. These limitations comprise: (*a*) the letters or writs from the sovereign under which it acts; (*b*) the laws of the commonwealth.[2] In case, then, the royal writ be silent on any matter, recourse must be had to the civil law. The act of him who does not recede from the royal mandate, given by writ or statute, is to be considered a sovereign act, and therefore binding upon government. Persons aggrieved by some act of the latter may appeal to the sovereign, and he can force the individual, or majority of an assembly who became authors of such act, to pay the damages. A previous protest from the minority of a governmental assembly is often necessary to free them from financial responsibility. A different case presents itself with respect to a sovereign assembly. Here such a protest would deny sovereign power, for all become authors of what the majority performs. Hobbes places administrative officers, parliament, and private corporations, on the same plane. They are all creatures of sovereignty, and may be created or dissolved at its will. Parliament, as a body politic, represents temporarily every subject of the realm. It was called originally through the king's writ, is limited as to the scope of its business, and can only be assembled and dissolved by the sovereign power.

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[1] Du contrat social, p. 309.
[2] Leviathan, p. 106.

To make this body the absolute representative of the people would constitute it a sovereign assembly, thus creating two supreme authorities within the same jurisdiction. After the dissolution of parliament, each member loses his official capacity, and becomes again a private citizen; hence public ministers, like the sovereign, have a natural as well as a political capacity.[1]

Hobbes distinguishes between public servants and those engaged in the general administration of a whole or part of the realm. If the latter act according to sovereign instructions, not incompatible with the law of nature, they represent the sovereignty and must be obeyed. Compared with it, every magistrate is but a private man, and since he may have private ends in view, the sovereign, personally or by deputy, should act as a final court of appeal. In fine, the sovereign rules "Dei gratia," the magistrate "Dei gratia et regis."[2]

According to Locke, the first positive law of any commonwealth is the establishment of the legislature, being the basis upon which all government rests. Once constituted, we have seen that the legislative power can never again revert to the people except through revolution, and that it acts as "the joint power of every member of the society given up to that person or assembly which is legislator."[3] Its power is necessarily limited to the public good of the society; for a compact founded on any other principle would, *ipso facto*, ignore the law of nature, and furnish no legal basis upon which to erect a commonwealth. Locke cites four bounds to legislative power: (*a*) it must aim for the preservation of each individual obeying natural law; (*b*) arbitrary decrees can never take the place of promulgated, established laws; (*c*) it cannot take property from any man except by his consent, given personally or through a deputy; and (*d*) the legislature can never delegate its legislative power. As necessary adjuncts of the legislature, Locke mentions the executive and federative powers of gov-

[1] Leviathan, p. 113.
[2] Leviathan, p. 113.
[3] Two Treatises of Government. Ch. XI, § 135.

ernment; the former attending to the administration of municipal, the latter to international law.[1] He notes the position of an executive who also has a share in the legislative functions of government. To such a person is often granted the prerogative of calling the legislature, a duty which, in a certain sense, renders him superior to the legislature itself. Back of both, however, we find the sovereign people. The monarch who seeks his own aggrandizement, by trying to stifle the sentiments of the people expressed through their delegates, is a rebel, *i. e.*, seeks to bring back again the state of war.

Locke finds no legal basis for the state in conquest.[2] The conqueror in a lawful war has not an unlimited right over the confiscated estates of his enemies. Sufficient may be taken from them to repay him for damages received, but the heirs of the conquered inhabitants have still a natural right to the estates of their progenitors, and the freedom of their own persons. Neither of these can be lawfully surrendered, except to a government of their own choice. The conquering nation, while exercising dominion over them, can exact no legal claim to their obedience, and may be lawfully overthrown by the conquered inhabitants at the first opportunity.

In his discussion upon the dissolution of governments, Locke maintains that men may be thrown back upon the social pact through the illegal acts of either the prince or the legislature.[3] Government is generally dissolved, (*a*) when the prince rules by arbitrary decrees, and subverts statute or constitutional law; (*b*) if the legislature be not assembled when the good of the state demands it; (*c*) by the corruption or interference with the legislative vote; (*d*) the betrayal of the state by prince or legislature into the hands of a foreign power; and (*e*) the failure of government to protect the people and enforce the laws. All these are the acts of "rebellantes," who thereby forfeit their fiduciary privileges, and force each subject to reconstruct the state, according to the principles laid down in the fundamental pact.

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[1]Two Treatises of Government. Ch. XI.
[2]Two Treatises of Government. Ch. XVI.
[3]Two Treatises of Government. Ch. XIX.

Between the individual as subject and the individual as part of the sovereignty, Rousseau places an intermediary power termed government, or the prince. This is not based upon any contract between the people and their rulers, for, (*a*) the people as sovereign cannot be limited; (*b*) such a contract would be merely a private one; (*c*) it would place each party in the state of nature, and practically destroy the sovereignty of both. "Il n'y a qu'un contrat dans l'Etat, c'est celui de l'association, celui-là seul en exclut tout autre."[1] Such is the only public contract possible. The question arises, how then can government be instituted? Now, the first act of any newly-formed society is to declare that there shall be a body of government of a certain form. Such an act Rousseau terms a decree. Society now becomes a pure democracy, each citizen acting as a magistrate, and descending to private acts, which are simply decrees, decides that such a man or body of men shall hold the executive power. This having been accomplished, the pure democracy becomes, *ipso facto*, dissolved. In government, then, we see "un Corps intermédiaire établi entre les sujets & le Souverain pour leur mutuelle correspondance, chargé de l'exécution des loix & du maintien de la liberté, tant civile que politique."[2] This government whether acting in a monarchical, aristocratic, or democratic form, exists simply as an agent of the sovereignty. It may be limited, modified, or recalled, at the discretion of the latter, its sphere being particular and confined solely to individual acts. "Les dépositaires de la puissance exécutive ne sont point les maîtres du peuple mais ses officiers, qu'il peut les établir & les destituer quand il lui plâit."[3]

Rousseau considers that no one form of government can be the best for all people, nor even for a single nation at every period of its existence. Government, however, must be made stronger as the state increases in population. This fact would naturally require that the sovereign power be more plainly declared in general assembly, since government always re-

[1] Du contrat social, p. 305.
[2] Du contrat social, p. 253.
[3] Du contrat social, p. 307.

mains a standing menace to popular sovereignty. These general assemblies are the repositories of the general will. "A l'instant que la peuple est légitimement assemblé en Corps Souverain, toute jurisdiction du Gouvernement cesse."[1] In every case where one must perish, the government should be sacrificed to the people, and not the people to the government. Whenever the prince does not adhere to the laws, or usurps the functions of sovereignty, the pact is broken, the state dissolved, and force alone holds sway.

Government is also an intermediary force between society and the individual. Now, while the force of any individual remains practically a fixed quantity, that of government is continually increasing or decreasing in energy as it becomes vested in one, few, or many agents. Sovereignty, therefore, must be the lever for properly adjusting these opposing forces, since upon their harmonious relations the stability of a state depends.

A magistrate also works under the influence of three wills, the private, the magisterial, and the general.[2] The private will he possesses in common with every individual. His will as a magistrate is general with respect to government, but private in its attitude towards the state; the "general will" he possesses as a citizen of some commonwealth. In a well-ordered government his private will should be eliminated, and the magisterial subordinated to the "general will." An ill-adjustment of these three wills furnishes the seeds of ambition, tyranny and revolution.

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[1] Du contrat social, p. 298.
[2] Du contrat social, p. 260.

CHAPTER III.

IN the application of this theory to the principles of the American Revolution, we shall find the social compact assuming a two-fold phase, as previously expounded by Rousseau and by Locke. Jefferson seems to have been influenced by the former, as John Adams certainly was by the latter.[1] It will be our aim to show how far the theorising of Americans, cotemporary with or immediately succeeding the Revolution, upon this important subject, may have influenced the dissolution and reconstruction of government in America.

The general attitude of Americans previous to the Revolution with respect to the social pact is well brought out in a speech by James Otis, 1765. He broaches four theories for the origin of the state: (*a*) grace, being substantially equivalent to papal dominion; (*b*) force, which saps the foundations of morality; (*c*) compact; and (*d*) property.[2] While dwelling upon the great questions involved in the compact theory, he takes no decided position with respect to it, though willing to admit that the necessities of man's nature are certainly the mainspring of society. The questions, however, which he asks, in regard to the nature of a social pact, show that the colonies were well versed in the political discussions of Locke and Rousseau.[3] These questions deal with the time and circumstances under which the first compact was formed, and as to the number that then contracted. Otis inquires whether the contractors can legally bind succeeding generations, and the latter still be born free. If all are to be justly bound, a continual pact would be necessary. Granting that every man has the right to contract, may there not be as many original compacts as there are men

[1] Mulford. The Nation, p. 44.
[2] The Rights of the British Colonies Asserted and Proved, p. 1.
[3] The Rights of the British Colonies Asserted and Proved, p. 4.

and women born into society? Shall the sovereign individual secede from the state whenever he so desires? A feeling of consistency would warrant the right to secede if a man can freely contract.

These problems seem to show that the social pact had become with American colonists an important question. Otis considers them as reasonable, though they may not be very practical, and in any case the fact that there exists a compact between king and people is not disproved, though the questions already proposed be somewhat chimerical.[1] We shall presently see that while the more conservative patriots based their natural rights upon an "original contract" between king and people, others were disposed to locate them ultimately in pre social man.

We proceed to consider the social principles evolved in England from the British constitution, and their adaptation upon American soil with a view to support the contractual theory of government.

The English government presents three classes of powers: first, those of the people itself; secondly, the constitution; lastly, the civil law.[2] Constitutional and civil law have their origin in the people. Now, the British constitution may be termed a compact as well as a public law. It implies agreements entered into, rights determined upon, and certain forms prescribed by the inchoate members of society, at the first settlement of their union.[3] The terms of the pact may be summarized in security of life, liberty, property, and freedom of trade. Magna Charta, containing the fundamental principles of the constitution, was an act of the whole people, and not that of the legislature alone. Its foundations rest upon the law of God and of nature.[4] Samuel Adams bases this constitution upon the principles of "nature and reason," since it possesses no more power over any subject than is absolutely necessary for the maintenance of government, the latter being designed

[1] The Rights of the British Colonies Asserted and Proved, p. 6.
[2] Abingdon, Thoughts on the Letters of Burke, 1777, p. 27.
[3] *Ibid*, p. 28.
[4] The True Sentiments of America. Dublin, 1769. P. 12.

to protect the inalienable rights of nature, which cannot be surrendered by any pact.[1] In the protection of these rights, Englishmen, whenever oppressed, had fallen back upon their constitution, since the time that the Magna Charta was formulated.[2]

The tyranny of the Stuarts found its natural antidote in the English Revolution of 1688. At that time Englishmen sought in the British constitution deeper than they had ever done before for an explanation of the laws of God and nature. This Revolution was simply a struggle between might and right; not a question as to who had a right to the throne, but what were the rights of the king upon the throne.[3]

In this connection Otis asks the question, whether, during the interregnum, inhabitants of Great Britain were in a state of nature or of society?[4] Now, if we admit that they then existed in a state of nature, every individual was equal, and had a right to be considered in the formation of a new pact. Universal consent, or at least that of a majority of all the citizens, would have to be obtained. Those not entering the pact were still in a state of nature, and could not be legally bound to any particular government. The orange-woman and the noble lord might then have an equal right to vote for a successor to James II. Otis fails to answer the question, but maintains that the process of reconstruction was not arbitrary, depending solely upon compact.

Turning to facts, we find that the form of government was settled by contract at the hands of a convention, and its establishment based upon the law of God and nature.[5] This convention declared, February 7, 1688, that King James II had endeavored to subvert the constitution of the kingdom by "breaking the original contract between king and people."[6] He also had broken the original contract made with the Ameri-

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[1]The Life and Public Services of Samuel Adams. Vol. I, p. 97.
[2]The Life and Works of John Adams. Vol. X, p. 314.
[3]J. Q. Adams, Quincy Oration, 1838.
[4]J. Otis, The rights of the British Colonies Asserted and Proved, p. 6.
[5]J. Otis, The rights of the British Colonies Asserted and Proved, p. 23.
[6]H. Niles, Principles and Acts of the Am. Revolution, p. 78.

can colonies in the form of charters, so that his three kingdoms had the same grievance as our ancestors.[1]

Later we find that Massachusetts obtained a charter from his successor, and John Adams, in considering the political status of the colonists regarding this revolution, shrewdly remarks: "It ought to be remembered that there was a revolution here as well as in England, and that we, as well as the people of England, made an original express contract with King William."[2] It should be noted that the colonists were willing to pay allegiance to the king in his natural, but not in his political capacity; and determined to hold him and his successors to the terms of the covenant, and obey no laws except those made through their representatives. The following remark, made by Samuel Adams, would seem to justify this position: "Should a king call a parliament but once in seven years, and on its meeting instantly dissolve it, and so repeatedly, a few such repetitions would ruin him, and be deemed a total dissolution of the Social Compact."[3]

Now the colonists, though willing to pay allegiance to the king in his natural capacity, refused to acknowledge parliament's supremacy over them, and the debate respecting its jurisdiction and representative nature, forced advocates of the American Revolution to recur to the theory of a social compact. It being impossible for the colonies to obtain representation in parliament, they were determined to maintain its existence in their colonial assemblies. John Adams, it appears, thought that a certain junto in the colonies was planning to overthrow the charters, remodel and consolidate British America, and thus bring it more directly under the control of parliament.[4] Men guilty of such offences he considered rebels; since they attempted to bring back again the state of war.[5] He saw that if parliament gained the supreme legislative power, it practically possessed sovereignty. Cognizant of

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[1]The True Sentiments of America, p. 10.
[2]The Life and Works of John Adams. Vol. IV, p. 114
[3]The Life and Public Services of Samuel Adams. Vol. I, p. 404.
[4]The Life and Works of John Adams. Vol. IV, pp. 24, 78.
[5]The Life and Works of John Adams. Vol. IV, p. 84.

this fact, he confined its authority to the "four seas,"[1] so that, neither by the law of nature, by common or by statute law, could it exercise jurisdiction over the colonies. He admitted that parliament had authority over the trade of its dominions, such authority, however, being based upon expressed and implied consent.[2] Adams foresaw the danger threatening the colonists in this direction. To summarize: the power of a British parliament divested of right can never furnish a legal claim. It can never deprive the people, without their consent, of any natural right, or of those civil rights based upon compact.[3] Parliament thus becomes limited to the public good, for there can be no unlimited power in a limited monarchy.[4]

Now, the more parliament sought to establish its absolute sovereignty over the colonies, the more necessary our ancestors found it to emphasize their natural rights as embodied expressly or implicitly in the various "charter compacts." These charters, obtained by the colonists from various kings, differed, naturally, in their contents and import. Our ancestors always looked upon them as the essence of their political existence, being "original compacts" between the king and the people of the colonies. Now, the king had manifestly a right, by virtue of his prerogative, to contract with his subjects, guaranteeing them the privileges of Englishmen in return for the dangers incurred by colonization.[5] "Such a contract as this was made with all the colonies, royal governments as well as charter ones."[6] The charters were given under the Great Seal, which never has had a binding force beyond the "four seas."[7] All obligation to obey them must have sprung, therefore, from compact and the law of nature. When forfeited by the grantees, the king could legally have withdrawn

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[1] The Life and Works of John Adams. Vol. IV, p. 37.
[2] The Life and Works of John Adams. Vol. IV, p. 114.
[3] Richard Bland. An inquiry into the rights of the British Colonies p. 20.
[4] Abingdon. Thoughts on the Letters of Burke, pp. 43, 47.
[5] J Q. Adams, Quincy Oration, p. 7.
[6] The Life and Works of John Adams. Vol. IV, p. 126.
[7] The Life and Works of John Adams. Vol. IV, p. 150.

his protection and left the colonies in a state of nature.[1] We noted that from the outset the colonists were independent of parliament. Their dependence on England, in fact, was based on parchment and proclamation, and generally considered repugnant at that time to the laws of nature and reason.[2] The first charter granted by James I to Raleigh and his heirs, certainly reads more like a treaty between sovereigns than a grant of privileges by sovereign to subject.[3] The territory was to be united to England in "perfect league and amity," and the grant to the colonists in "perpetual sovereignty."[4] Charters, as compacts, in their obligations certainly exceeded all others, and we may look upon them as: (*a*) trusts, sacred because they bound the conscience with a religious sanction; and (*b*) limitations upon government, transcending other landmarks.[5]

Towards the middle of the eighteenth century, Americans began to study these charters more closely, to determine their political status with respect to Great Britain. Here John Adams took an extreme position. In his view, the first colonists carried with them only natural rights, and having settled a new country, according to the law of nature, they were not required to continue a part of the British state.[6] If we adopt this theory, then, the laws of the colonies must be considered as based upon nature and charter compacts. The Plymouth colonists could show no charter or patent from the crown or parliament, but the question remains whether they "purchased land of the Indians, and set up a government of their own, upon the simple principle of nature exercising all the powers of government, upon the plain ground of an original contract among independent individuals for sixty-eight years, that is until their incorporation with Massachusetts."[7] We see from this assertion that Adams cut loose from any conception of a

[1] The Life and Works of John Adams. Vol. IV, p. 127.
[2] J. Q. Adams, Quincy Oration, p. 16.
[3] The Life and Works of John Adams. Vol. X, p. 359.
[4] R. Bland, An Inquiry into the Rights of the British Colonies, p. 13.
[5] Writings of James Madison. Vol. IV, p. 468.
[6] The Life and Works of John Adams. Vol. IV, p. 102.
[7] The Life and Works of John Adams. Vol. IV, p. 110.

political contract, and traced colonial rights back to the state of nature and a fundamental pact.

Some of the colonists left Great Britain, as we have seen, free from express contract or positive engagement. Samuel Adams always insisted that such men had a natural right to institute a commonwealth "in vacuis locis."[1] Societies taking possession of practically vacant lands, and declaring their intention of settling upon them, may, according to the political tenets of Locke, legitimately fix their limits, in addition to occupying what was before considered common to all.[2] In any case we may assume that the colonists did not owe their existence to the will of a British parliament.[3]

As regards the aborigines, it must be acknowledged that they, too, as John Adams expressed it, "had a right to life, liberty, and property in common with all men."[4] Each Indian had a natural right to a limited amount of territory, with its products; but this did not justify him in monopolizing a continent. Irrespective, however, of charter rights, the colonists considered that the Indians had rights, and preferred to obtain their lands by purchase.[5] John Quincy Adams enumerates two social pacts, formed by the first American colonists, one based upon charters, dealing mainly with their external relations, the other dealing with social questions between themselves and the Indians.[6]

American statesmen, cotemporary with the Revolution, were determined to prove the existence of the charters as compacts by an appeal to English history; hence we find reference made to the incorporation of Wales and Ireland. Now the former, originally a feudatory principality, was annexed to the English crown by Edward I. We see in it a union *jure feudale et non jure proprietatis*, accomplished by royal edict, not by parliament.[7] In the reign of Henry

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[1] The Life and Public Services of Samuel Adams. Vol. I, p. 429.
[2] Jefferson's Complete Works. Vol. VII, p. 467.
[3] Jefferson's Complete Works. Vol. I, p. 131.
[4] The Life and Works of John Adams. Vol. X, p. 359.
[5] Lathrop's Artillery Sermon, p. 33.
[6] J. Q. Adams, Washington Address, p. 10.
[7] The Life and Works of John Adams. Vol. IV, p. 126.

VIII an express contract was made, the Welsh obtaining the rights, liberties, and immunities of Englishmen, together with parliamentary representation. By this pact it became part of the English realm. Ireland at first occupied a position analogous to that of Wales. In the reign of Henry VII "an express contract was made between the two kingdoms, that Ireland should, for the future, be bound by English acts of parliament in which it should be especially named."[1] The colonists claimed that America had made no such contract, and therefore could not be a part of the British realm. Such questions fall rather within the domain of "political contract"; still they show how America was making a practical application of Locke's political system.

The cases cited would seem to show that the colonists were desirous of proving that the Common Law of England existed in America through convention, and not as a system necessarily imposed upon them. Now, whether we look upon the first colonists as bringing this system with them, or as subsequently adopting it, the law was manifestly that of individual colonies, and not one dominating the whole, considered as a single society.[2] In this connection John Adams remarks: "Our ancestors were entitled to the Common Law of England when they emigrated, *i. e.*, to just so much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose it."[3] We may suppose that, though the colonists, when they landed in America, found no such system of law existing here, yet they willed its continuing with them. Having formed themselves into a commonwealth, they declared officially that the general will favored its permanent adoption; in fine, they accepted it merely as being the highest reason.[4]

Let us now consider how the colonists speculated upon, and then practically applied, the four fundamental principles, which we have already seen constitute the essence of any social compact theory.

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[1] The Life and Works of John Adams. Vol. IV, p. 156.
[2] Writings of James Madison. Vol. IV, p. 533.
[3] The Life and Works of John Adams. Vol. IV, p. 122.
[4] Jefferson's Complete Works. Vol. IV, p. 303.

First, the state of nature furnished an interesting theme for discussion to the Boston orators from 1772–81. Benjamin Church, in an oration of March 5, 1773, follows Hobbes in his conception of the pre-social state. His views may be stated substantially as follows:[1] Man originally was ignorant of social obligations, abhorrent to any idea of dependence, and displayed a savage ferocity in all his actions. The exigencies of his situation naturally impelled him to seek self-preservation by acts of treachery and violence. This condition may be fitly characterized as a state of eternal warfare. A sense, however, of the wants and weaknesses of pre-social man finally induced him to consult reason and seek to arrest the enormities of a state of nature. He began to suspect that mutual aid and support were the necessary concomitants of society. So men began to incorporate, subordination taking the place of natural independence, order succeeding anarchy. As a result the passions of men became gradually subdued. Society lent its aid to the oppressed, through a system of laws binding upon all, by the terms of the compact.

The speech of Jonathan Mason, March 6, 1780, enters more fully into the condition of pre-social man, and presents many points of similarity with the theory of Rousseau.[2] Here man is depicted as possessing a constitution remarkably adapted for social intercourse. Certain wants presenting themselves from the very moment of his birth, taught him how powerless he was to supply them single-handed. This solitary being, therefore, looked around for some friendly neighbor. He finally discovered his "*alter ego*," a creature whose heart permitted her to engage in mutual kind offices. The souls of both were thus affected, and they sought to express the sense they felt of these mutual obligations. A confidence sprang up between the first-named man and his benefactress. They swore eternal friendship, and compacted for reciprocal aid and protection. Thus they pursued the routine of life, bent only on satisfying the desires of nature. One exercised ingenuity,

[1] Niles, Principles and Acts of the American Revolution, p. 9

[2] Niles, Principles and Acts of the American Revolution, pp. 41-42.

the other physical force in resisting opponents. Hence the family sprang into existence; a social ring dominated by a series of equally circular obligations. Men discovered that a part of the community could now provide for the needs of the whole body. This allowed a part, therefore, to add conveniences to the necessities of nature. Each man sought property and personal security, and, in order to obtain them, became willing to submit to a guardian over the inchoate society. They entrusted to him the care of a certain part of their natural rights, and knew of no superiority except that obtained by virtue and love. Certain natural rights were thus surrendered in order to secure the remainder, and, as the pact was mutual, the ruler was solemnly bound to re-cede them either at the request of the sovereign society, or when the desired end for which he received them had been perverted.

All theorizers on the pre-social state admit that men in this condition must necessarily have been free and independent of each other.[1] We see this idea elaborated by Otis in his speech on "Writs of Assistance."[2] Man in a state of nature is there described as an independent sovereign, subject only to the law of God and reason. No fellow man can, therefore, dispute his natural rights to life and liberty. Property, both in its acquisition and possession, being inherent to man's nature, must also be placed on the same basis. Throughout the speech, Otis shows a partiality for the doctrines of Rousseau. His later writings, however, manifested a marked reaction in this respect.

Samuel Adams characterized this state of nature as one in which, under God, every man becomes sole judge of his own rights and of the injuries done to him.[3] The perfection of liberty such an individual finds, in being free from external force, and performing those actions which his conscience judges to be best conducive to happiness.[4] We note the fact that

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[1] R. Bland, An Inquiry into the Rights of the British Colonies, p. 9.
[2] Tudor's Life of Otis, p. 62. The Life and Works of John Adams. Vol. X, p. 314.
[3] The Life and Public Services of Samuel Adams. Vol. I, p. 508.
[4] The Life and Public Services of Samuel Adams. Vol. I, p. 19.

this internal force, superior to reason and controlling mental actions, would not have made external violence any great privilege after all. If liberty was an essential factor of the pre-social state, man in that condition could not lawfully have been deprived of the same, and he had no right to surrender any portion of it by compact, except for the purpose of placing the remainder upon a more stable foundation. The patriarchs have been described as living in a state of nature, employing hired servants for the defense of life, liberty, and property. If men had continued in that happy state, civil society would certainly have been unnecessary; but as Samuel Adams remarks, "in the present corrupt age no such state of nature can exist."[1]

Turning to history, we find the first action of the Continental Congress, September 5, 1774, was to discuss the political status of the colonies.[2] Galloway claimed that if the latter were not within the jurisdiction of parliament, then they must be independent states. Henry went still further, asserting that government was dissolved—the fleets and armies sent against them proving the same. In that case it would follow that "all America was thrown into one mass," landmarks removed, and the colonists in a state of nature.

In their speculations upon the state of nature, the colonists sought to clearly define its necessary concomitants, natural law and natural rights. An objection is often made that the laws of nature are mere abstractions. We may, however, speak of right and justice as abstractions; yet the rational man realizes that back of them there exists an omnipotent God as their author.[3] The first fundamental law of society, to which even the legislature is subject, may be termed the preservation of the society itself.[4] This law of nature Samuel Adams considered the law of the Creator himself.[5] Such a law evidently lies back of provincial law, and to it every indi-

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[1]The Life and Public Services of Samuel Adams. Vol. I, pp. 19-20.
[2]The Life and Works of John Adams. Vol. II, pp. 366-368.
[3]J. Q. Adams, Quincy Oration, p. 18.
[4]The Life and Public Services of Samuel Adams. Vol. I, p. 506.
[5]The Life and Public Services of Samuel Adams. Vol. III, p. 325.

vidual and commonwealth must bow, for it cannot be abrogated by men.[1] "No human law can be of force against it, and, indeed, it is an absurdity to suppose that any such law could be made by common consent, which alone gives validity to human law."[2]

Again Samuel Adams insisted upon the natural rights of the colonists to life, liberty, and property, together with the privilege of defending them in the best manner possible.[3] These rights are generally considered branches of, not deductions from, the first law of nature, *viz.:* self-preservation.[4] Suppose that men originally entered society by voluntary consent, having a natural right to remain in a state of nature as long as they pleased to do so; then on joining society "they had a right to demand, and insist upon the performance of such conditions and previous limitations as form an equitable compact."[5] It follows that every natural right not expressly given up, or necessarily ceded by compact, is still in the possession of each contractor. These rights cannot be surrendered; for the end of government is merely to protect them, and a disposal of them would be an act null and void, according to the principles of natural law.[6] Despotic power rests upon principles incompatible with a natural right to life. We must, therefore, look upon the latter as a divine, not a human gift, of which no physical or moral power can deprive a man, except for war or self-defence.[7]

These fundamental principles of popular government did not escape the notice of American statesmen during revolutionary times. In the Continental Congress, September 8, 1774, Lee claimed that the rights of the colonists were erected upon a four-fold foundation: nature, the British constitution, charters, and immemorial usage.[8] He emphasized, however, their basis on nature, considering that charters rested upon

[1] J. Otis, Rights of the British Colonies Asserted and Proved, p. 46.
[2] The Life and Public Services of Samuel Adams. Vol. II, p. 53.
[3] The Life and Public Services of Samuel Adams. Vol. I, p. 502.
[4] Votes of Boston, 1772, p. 1.
[5] Votes of Boston, 1772, p. 3.
[6] Votes of Boston, p. 7.
[7] J. Q. Adams. Quincy Oration, p. 13.
[8] The Life and Works of Adams. Vol. II, p. 370.

precarious foundations. Others, as Rutledge, thought it better to lay them in the English Constitution.

We find the inhabitants of Virginia reminding the king, through their delegates to the Continental Congress, that the first American colonists, free inhabitants of the British dominions, "possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them."[1] On this principle, they claimed, the Anglo-Saxons had settled Britain.

This theory of natural rights was unduly magnified during Revolutionary times. It was claimed, not merely that every individual has a natural right to reason freely upon the nature of a government to which he submits—a manifest duty imposed on rational beings—but that any nation has the right to change its political principles and constitution at will.[2]

Jefferson continually insisted that children attributed their free birth to nature itself, and not to parents, and that having attained maturity each possesses a right to his own body and the fruits of its exertion.[3] It is rational to suppose that no man has a right to obstruct another in the innocent gratification of those faculties and sensibilities which are an integral part of the human constitution.[4] To judge between himself and another, we have seen from Locke, can be the natural right of no rational being; it being his manifest duty to submit to the umpirage of a third party.[5] To summarize, in the words of Jefferson, "nothing is unchangeable but the inherent and inalienable rights of man."[6]

In treating of the social pact itself, we shall find it more convenient to commence with the abstract theories of Otis[7] and Church.[8] The former considered that natural sympathies,

[1] Jefferson's Complete Works. Vol. I, p. 125.
[2] H. Niles, Principles and Acts of the American Revolution, p. 27. Jefferson's Complete Works. Vol. IV, p. 493.
[3] Jefferson's Complete Works. Vol. VI, p. 197.
[4] Jefferson's Complete Works. Vol. VI, p. 591.
[5] Jefferson's Complete Works. Vol. VII, p. 1.
[6] Jefferson's Complete Works. Vol. VII, p. 359.
[7] The Life and Works of John Adams. Vol. X, p. 315.
[8] H. Niles, Principles and Acts of the American Revolution, p. 9.

and the magnetism of the sexes, gradually drew men into small, then larger, associations. Irrespective, however, of the size of such assemblies, men were always dominated by the grand principle of association; *viz.:* protection of life, liberty, and property. Smaller assemblies may have existed independent of express contract, but sooner or later they were found incompetent to satisfy the ever-widening scope of human speculation. Compact displaced all lingering conceptions as to a government of force. Men perceived that the latter could furnish no legal basis for right, and that they might lawfully resist such at the first favorable opportunity. Compact thus became the expression of free moral agents.

Church looked upon the first pact as a tacit one, made by each individual with an inchoate society. With the expansion of the latter, however, it became necessary that some formal expression of contract should be exacted from the inchoate citizen. This added force to the laws of the growing commonwealth. In this pact, society expressed itself willing to sacrifice liberty and natural equality, and content to obey the mandates of popular magistrates. The love of order prevailed over a natural inclination for independence. Unrestrained power, "one making the whole, and the whole being nothing," he thought might have been the first political establishment after a period of anarchy; but increasing civilization soon led to the decentralization of such a government. It is natural to suppose that each contractor intended a permanent exemption from any claims not expressly surrendered at the making of the pact, and on this principle the sole end of government becomes "security and defence of the whole."

Madison considered compact as one of the fundamental principles of free government, and affirmed that the original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society.[1] "Into this society men enter voluntarily, and subject themselves to that body in which, by common consent, they have vested the legislative power."[2] Most civilized states of this century have

[1] Writings of James Madison. Vol. IV., p. 63.
[2] Votes of Boston. P. 8. R. Bland, An Inquiry into the Rights of the British Colonies, p. 9.

laid down these two propositions as the fundamental principles of free government.

Otis, years before, assumed that any person on attaining maturity, might choose that commonwealth to which he desired to attach himself.[1] Individuals then who enter one at the present day, simply agree to umpirage, but no more renounce their natural rights than they would by taking a case out of the ordinary legal channel and submitting it to arbitration.[2] Conscience, *e. g.*, is usually looked upon as a reserved right. Granting the social pact to be a positive fact, we may naturally infer that the original contractors intended this should be placed beyond the legal jurisdiction of any form of government established by the pact.[3]

John Adams, in discussing the political status of the Plymouth colonists, refers to a social compact drawn up on board the Mayflower, and probably signed unanimously.[4] It reads as follows: "We, the loyal subjects of our dread Sovereign Lord, King James, do, by these presents, solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation."[5]

A few years subsequent to the Revolution, Jefferson, referring to the proposed construction of a government on the Tombigbee, states that he had been requested "to trace for them the basis of a social pact for the local regulations of their society."[6] Again, one of the first considerations in the Continental Congress was directed towards the British constitution. Jay claimed that it derived its authority from compact, and, therefore, by compact its authority might be annulled.[7]

We often find this theory advocated on theological grounds. One American divine announced from the pulpit, during the Revolution, that "the wisdom of the Father taught man by

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[1] J. Otis, Rights of the British Colonies Asserted and Proved, p. 15.
[2] The Life and Public Services of Samuel Adams. Vol. I, p. 503.
[3] Writings of J. Madison. Vol. IV, p. 393.
[4] The Life and Works of John Adams. Vol. IV, p. 108.
[5] Bancroft's U. S. Vol. I, p. 309.
[6] Jefferson's Complete Works. Vol. VII. p 56.
[7] The Life and Works of John Adams. Vol. II, p. 371.

social compact to secure for himself the comforts of life."[1] Another considered that Issachar, Zebulon, and half the tribe of Manasseh formed a "great original contract," whereby they were allowed to separate from the rest of Israel, and reside beyond Jordan, still continuing, however, in common with their brethren, under the government of Jehovah.[2] In this circumstance he found an analogy to the relations existing between Great Britain and the colonists, so that the latter held their lands by "plain, original contract."

An eminent statesman finds in the covenants of the Old Testament a sanction for the political principle of attributing all legitimate governments to a compact, based upon the law of nature.[3] Thus the covenant with Noah rests upon general principles; that, however, with Abraham, deals with questions of government and religion. He sees the influence of these covenants asserting itself, not only in the subsequent Jewish and Christian religions, but also in our modern conceptions of human rights and the foundation of government.

The patriots in their political discussions did not fail to emphasize the true nature and ends of sovereignty and government. Now sovereignty must rest ultimately in the people, its end being the common good; although the people of a government based upon the compact theory, cannot definitely locate it.[4] The people of America, trusting in their natural rights, seized this sovereignty in 1774, and four years afterwards entrusted the same to Congress. Congress thereupon became sovereign, both *de jure* and *de facto*.[5]

Referring to the tendency of the separate commonwealths to assume sovereign powers, John Quincy Adams notes that the constitutional pact fixed no limits as to its duration, being made before God, and consisting in the mutual pledge of each to all, and all to each.[6] An American statesman, in fact, once as-

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[1] Sermon by Jacob Duché, 1775, p. 12.
[2] Smith's Sermon on American Affairs, pp. 3-10.
[3] Memoirs of J. Q. Adams. Vol. IX, p. 347.
[4] James Otis, Rights of the British Colonies Asserted and Proved, p. 12. J. Q. Adams, Quincy Oration, p. 13.
[5] The Life and Works of John Adams. Vol. X, pp. 144, 159.
[6] J. Q. Adams, Quincy Oration, p. 22.

serted that the United States government was the first one to be established upon the simple principles of nature.[1] This would seem to favor the position taken by many of the colonists, that government, existing solely for the defense and happiness of its subjects, must be the creature of human ordinance.[2] From such a standpoint, we see it furnished by the contractors, with certain moral and physical forces, the nature of which must be found in the pact itself.[3] The Americans, in their reconstruction of government, took great pains to exclude from it all conceptions of unnatural force, by binding, equally and mutually, all the parties to the pact.[4] In contrasting laws received from conquerors, and those received from the sufferings of ancestors, Samuel Adams notes: "The people of this country alone have formally and deliberately chosen a government for themselves, and with open and uninfluenced consent, bound themselves into a social compact."[5] Finally, on the dissolution of a government, we must conceive of its authority as being transferred to the whole body of the people and not to any particular person or channel, for the renewal of its expression.[6]

We proceed now to consider some political conceptions, the natural outgrowth of any contract theory of government and much discussed in connection with the American Revolution. First, what does the term "society" imply? Society may be said to have its origin in the weakness of individuals.[7] The end in view is manifestly the strength and security of all who contract; the public good, which of course implies the good of each individual.[8] As a general rule, men come into existence and society at the same time. If, however, these social bonds be dissevered, they fall back again into the state of nature, according to the social compact theory, their mutual relations being equivalent to those of two persons existing in

[1] The Life and Works of John Adams. Vol. IV, p. 292.
[2] H. Niles, Principles and Acts of the Am. Revolution, p. 9.
[3] Writings of James Madison. Vol. IV, p. 301.
[4] Writings of James Madison. Vol. IV, p. 228.
[5] The Life and Public Services of Samuel Adams. Vol. III, p. 417.
[6] Jefferson's Complete Works. Vol. VIII, p. 369.
[7] H. Niles, Principles and Acts of the American Revolution, p. 4.
[8] Lathrop's Artillery Sermon, 1774, p. 12.

a pre-social state outside the jurisdiction of commonwealths.[1] We may conceive of the individual as bringing into society his natural rights, which cannot, under any circumstances, be legally abrogated, and compacting for a share in all those social rights to which each member becomes entitled by the terms of the pact.[2] It is natural to suppose that in infant societies the motives of the pact were not soon forgotten. Equality, therefore, proved a more vital principle of society than it afterwards became, when the various social forces had centered in some authority, universally acknowledged.

We may assume, with Jefferson, that the natural wants of man, combined with the concurrence and exercise of faculties common to all, produced society, and that those moral duties which existed among men in the state of nature accompanied them into society.[3] We may even concede that the same moral duties exist at present between independent states as formally existed between individuals in the state of nature. Few, however, would agree with him in making the sum of individual duties which each contractor has, equivalent to the duties of the commonwealth.

Again is the conception of majority founded upon that of society; or does the former necessarily precede the latter?[4]

John Adams affirmed that, though the first aggregation of individuals into society came about through unanimity, yet provision must always be made either in the pact itself, or subsequently, for the absolute sovereignty of the majority.[5] We may look upon this law of majority as a natural one; and, just as individuals are dominated by a single will, so aggregations of men should be subservient to that of the majority.[6] It was even asserted by Jefferson that the law of majority being abrogated, government can no longer legally exist, but is supplanted by the law of force.[7] In discussing the Massa-

[1] J. Otis, Rights of the British Colonies Asserted and Proved, p. 43.
[2] The Life and Public Services of Samuel Adams. Vol. III, p. 325.
[3] Jefferson's Complete Works. Vol. VI, p. 589.
[4] Jefferson's Complete Works. Vol. VII, p. 613.
[5] The Life and Works of John Adams. Vol. IV, 301.
[6] Jefferson's Complete Works. Vol. VII, p. 496.
[7] Jefferson's Complete Works. Vol. VIII, p. 150.

chusetts constitution, we shall endeavor to show the practical impossibility of working in all cases in subservience to this law.

Madison views unanimity in the formation of the social pact as a moral impossibility; hence it must be assumed either that the parties to such a pact recognized that the will of the majority was equipollent to the will of all, from the nature of the compact itself, or that it was a law of nature evolved from the constitution of society.

In any case, the "*lex majoris partis*" may be considered as a complete substitution for the general will, *i. e.*, the will of every contractor; but does it possess a natural right to bind each contractor in all cases whatsoever?[1] True, the majority has admitted members into the social pact through naturalization. Such an act is really accomplished by a majority of the governing body exercising this right, as representative of a majority of the parties to the original pact. Society has carried this principle still further. The majority practically divides the sovereignty every time it divides society. As an illustration of this principle, Madison cites the separation of Kentucky from Virginia. So also the constitutional pact derives its binding force from the fact that it was instituted by a majority of the people in each state, acting in their sovereign capacity. The tendency of modern political thought would seem to disclaim the idea of the "natural right" of a majority.

Viewing society as a living organism rather than as an abstract conception, we find it subject to expansion and contraction. Hence arise questions concerning naturalization and expatriation. The latter has been considered a natural right, divinely implanted in man's nature for the furtherance of individual happiness.[2] Nature has certainly not marked out any geographical line, beyond which a man cannot legally go, for the promotion of his own welfare. Madison distinguishes between state secession and expatriation, and such a dis-

[1] Writings of James Madison. Vol. IV, p. 392-3.
[2] Jefferson's Complete Works. Vol. VII, p. 78.

crimination ought always to be made.[1] We may regard expatriation as an integral part of the social pact, or a privilege obtained from government. In any case such an act must not militate against the social interests of the state from which an individual secedes, a position which could not be taken with regard to state secession.

Upon the question of naturalization an interesting discussion arose in the First Congress. Some Americans thought that the Revolution, having dissolved the social pact and thrown each of the colonists into a state of nature, those who had not engaged in the struggle were not parties to the new pact.[2] The election to Congress of William Smith, a native American, but absent during the Revolution, was contested on the strength of this theory. Congress, however, decided that his birth in one of the colonies made him a party to both pacts.

Society being an organism, naturally implies an indefinite number of generations as its primary factor. Now between any two generations do we find relations existing, similar to those between independent states at the present time? If so, in both cases the law of nature alone acts as a bond of union, since each of the parties is well able to take care of its own affairs.[3] On this question we cite the remarkable words of Jefferson: "This corporeal globe and everything upon it belongs to its present corporeal inhabitants during their generation."[4] Since the will and power of an individual expire at his death, we may to a certain extent claim that the use of the earth pertains to the living, not the dead, for rights and duties characterize property, not things.[5] Jefferson goes so far as to maintain that the dead are not even things, their bodies having been resolved into their constituent elements, and, therefore, it is absurd to speak of the power and will of dead men. Generations he views as mere corporations, distinct and independent nations, possessing the natural right to bind themselves according to the will of a majority. Each,

[1] Writings of James Madison. Vol. IV, p. 336.
[2] Writings of James Madison. Vol. IV, p. 392.
[3] Jefferson's Complete Works. Vol. VI, p. 299.
[4] Jefferson's Complete Works. Vol. VII, p. 16.
[5] Jefferson's Complete Works. Vol. VII, p. 359.

then, may allow the acts of a preceding generation to stand, but back of this there always exists the sovereign right of repealing one or all of them when a change of circumstances should urge its necessity.[1]

We find, however, that a generation does not come and go at a definite time; and another difficulty is the fact that the true will of each contractor finds difficulty in expressing itself through a majority. This fantastic theory of Jefferson assumes that the rights of the whole are equal to the sum of individual rights. It would institute and dissolve government every generation.

Lastly the notion of society implies that each of its constituents possesses a right to, and holds, certain natural productions, excluding thereby the right of every other constituent to the same. This property right has been held by some to precede, by others to follow, the social pact. Many Americans favored the theory that property owes its origin to the state of nature. Viewed from this standpoint, any law which renders it insecure must be considered a violation of that end, inducing men to prefer society to the pre-social state; in fact, a subversion of society itself.[2] As a matter of fact, men have always possessed by natural law an equal right to procure and enjoy it, and he who invades this right puts himself in a state of war with all men, whether they live before or after the formation of a social pact.[3] No law of society can make this aggression just, for it is a breach of the law of nature. According to John Adams, "property in land, antecedent to civil society or the social compact, seems to have been confined to actual possession and power of commanding it. It is the creature of convention, of social laws and artificial order."[4]

Property rights, then, may be considered as based upon, (*a*) the natural wants of mankind, (*b*) the means employed in satisfying these wants, and (*c*) rights acquired by these means, provided that the former are not inconsistent with the equal rights of fellow contractors.[5]

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[1] Jefferson's Complete Works. Vol. VII, p. 311.
[2] The Life and Public Services of Samuel Adams. Vol. I, p. 456.
[3] R. Bland, An Inquiry into the Rights of the British Colonies, p. 19.
[4] The Life and Works of John Adams. Vol. X, p. 360.
[5] Jefferson's Complete Works. Vol. VI, p. 591.

We touch upon the somewhat mechanical views of Jefferson with respect to this subject. He inclines to the theory that an individual's property reverts at death to society, for the heir takes it, not by natural law, but by the law of society. The latter, in fact, may award it to a creditor of the deceased.[1] No man, then, has a natural right to bind his heirs to pay debts of the deceased, for such an act would make the dead, not the living, proprietors of the earth and its usufructs. A generation, also, cannot legally contract debts incapable of being paid during its existence, and in case all those constituting it should come and go at the same time, there would manifestly be no superior power capable of adjusting the debt. Neither can an individual father alienate the property of his son, for such an act would violate the first principle of association, which guarantees to every man the free exercise of labor, and use of its products.[2] So, then, according to Jefferson's views on this subject, successive generations are merely aggregations of fathers and sons respectively, and must therefore confine their financial obligations each one to the particular period of its existence.[3]

To summarize: we find that the colonists always insisted upon their property rights in America. Such a claim was based upon the facts, (*a*) that the country had been acquired by their own labor, and (*b*) that no compact could be produced, showing that they had, expressly or tacitly, surrendered this claim.[4]

It remains finally to trace the influence of the social compact theory, as seen in certain official documents of the United States. An American statesman once asserted that the Declaration of Independence, and the Articles of Confederation, as well as the federal and various state constitutions, were all established upon the terms of compact, and derived their authority from the voluntary consent of the contractors.[5] We find an element of truth in this assertion. The colonists,

[1] Jefferson's Complete Works. Vol. III, pp. 103-104.
[2] Jefferson's Complete Works. Vol. VI, p. 575.
[3] Jefferson's Complete Works. Vol. VI, p. 127.
[4] H. Niles, Principles and Acts of the Am. Revolution, p. 19.
[5] J. Q. Adams. Quincy Oration, p. 38.

at the opening of the Revolutionary War, in both their collective and individual capacities, were left without any regularly organized government, associations of civilized men, Christians in a state of nature, and not anarchists.[1] Mutual sympathies, common law and customs, furnished a basis upon which to reconstruct the new state.

We note an anticipation of the Declaration of Independence in the resolutions passed by the town of Mecklenberg, May 20, 1775. There it is asserted that "we, the citizens of Mecklenberg, do hereby dissolve the political bonds connecting us to the mother country, and abjure all political contracts with that nation."[2]

The American Declaration of Independence was the act of one people. In it we do not find the colonies definitely named, yet all understood that the parties to the pact were the people of thirteen colonies. It proclaimed to all nations "that the colonists had bound themselves before God to a primitive social compact of union, freedom, and independence."[3] The people of the united colonies, speaking though their representatives, declared themselves free and independent. In this connection John Quincy Adams well says: "The Declaration of Independence was a social compact, by which the whole people covenanted with each citizen of the United Colonies, and each citizen with the whole people, that the United Colonies were, and of right ought to be, free and independent States."[4] Such a compact equally emphasizes union, freedom and independence, as the basis of any free government. This declaration was the first act of sovereignty ever legally inherent in the people, and not resorted to until society had been reduced to its fundamental elements. Englishmen had never practically descended to the foundations of civil government, the laws of nature and of God. America swept away the old charters, took its stand upon the natural rights of mankind, and established one charter for all the colonies.[5]

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[1] J. Q. Adams. Address at Washington, July 4, 1821, p. 26.
[2] H. Niles, Principles and Acts of the Am. Revolution, p. 128.
[3] J. Q. Adams. Quincy Oration, p. 9.
[4] J. Q. Adams. Quincy Oration, p. 17.
[5] J. Q. Adams. A Discourse on the Jubilee of the Constitution, 1839, p. 9.

This was the political systems of Hampden, Locke and Sidney, reduced to practice. It proclaimed the inalienable sovereignty of the people, and that "the social compact was no figment of the imagination, but a real, solid and sacred bond of union."[1] The Constitution was based upon human institutions, and represented "right," but the Declaration of Independence represented "power." One was a dissolution, the other a complete re-institution of the social compact.[2]

Jefferson, with his usual partiality for the political doctrines of Rousseau, asserts that law, being the people's will, is not altered by changing that organ through which the will is expressed.[3] Now the colonists, through the Declaration of Independence, abolished their organ for the expression of the people's will. This will, however, remained intact; otherwise society would have been annihilated. We must, therefore, conclude that the former continued to exist until a newly appointed organ could declare officially that such a will was changed.

The United States constitution afforded an interesting object of discussion to exponents of the social compact theory. In it Madison finds two essential factors: (*a*) an implied, unwritten pact, in which the parties to it agreed to form one society; (*b*) a compact reduced to writing, by which members of society institute some particular form of government.[4]

He maintains that a union or society of states constitutes the foundation of that government, formed by the contractors; therefore the state governments and the United States government are not the parties to this "original constitutional pact"; neither can it be said that the state governments themselves are the contractors. Both of these positions might be defended in case of a "judicial controversy," but not with respect to the fundamental pact.[5] Madison attributed the origin of such misconceptions to English influence.

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[1] J. Q. Adams. Washington Address, p. 21.
[2] J. Q. Adams. A Discourse on the Jubilee of the Constitution, p. 42.
[3] Jefferson's Complete Works. Vol. IV, p. 303.
[4] Writings of James Madison. Vol. IV, p. 63.
[5] Writings of James Madison. Vol. IV, p. 18.

We know that in England the relations between monarch and people, promising protection on the one hand and allegiance on the other, were styled a "political contract," the real condition of affairs being, however, a government independent of the people. On the contrary, free governments are founded not on a pact, "between government and the parties for whom it acts, but among the parties creating the government."[1] In such a compact we find all the parties equal. One may say he has a right to secede from the terms of the pact, but the remaining contractors possess also the same right to deny the statement. The real parties to the constitutional pact must therefore be considered the states as representing the people in their sovereign capacity, and the constitution emphasizes the fact that the same authority which instituted the different state constitutions gave it birth; in fine, that states, not individuals, were parties to the pact.[2]

As regards the authority framing the constitution, Madison claims that it was not restricted to the selection of any particular form of government.[3] In this case its sovereign will might have fixed upon a confederacy, or have decided to consolidate the various commonwealths into one community, and this, too, without transcending the limits of the pact.

The constitutional pact was formed, we have already seen, by individuals embodied in distinct communities. Its dissolution would simply throw the contracting parties into the condition of separate social organizations.[4] If, however, the constitution was formed by the people of one community acting according to numerical majority, then a dissolution of the constitutional pact would throw each individual into a state of nature.

In case the United States constitution does not secure to each state those rights and privileges guaranteed by the terms of the pact, an appeal lies in the first instance to a constitutional amendment, and, as a last resort, to the sacred right

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[1] Writings of James Madison. Vol. IV, p. 336.
[2] Writings of James Madison. Vol. IV, p. 96.
[3] Writings of James Madison. Vol. IV, pp. 422-428.
[4] Writings of James Madison. Vol. IV, p. 241.

of self-preservation.[1] According to Madison, the provisions for expounding this constitution are involved in the pact itself.

Jefferson differed radically from his pupil with regard to the nature of the American constitution. With him each state at the Declaration of Independence became independent, and compacted with the remaining states to unite into one government for the purpose of accurately defining their internal and external relations.[2] The pact was based upon the peace and happiness of the several constituents, and made between independent nations. Hence he concluded each party to the pact had an equal right with the remainder to interpret it, and might, as a last resort, in cases of wilful abuse of power, appeal to the "ultima ratio gentium."[3]

In discussing constitutions and laws generally, Jefferson claims that these must advance along with the progress of the human mind, and that no generation can lawfully make either of them perpetual obligations upon its successor. "Every constitution, then, and every law, naturally expires at the end of thirty-four years."[4] He bases his reason for this upon the theory that if a generation of men could attain their legal manhood on a definite day, the majority would be dead thirty-four years from that date, and the constitution made or assented to by this generation would cease legally to exist at the same time; in fact, to exist upon its subsequent observance would be an act of force, not of right, since the unbiased will of a majority is hard to obtain, and does not make the power of repeal equivalent to that of fixed legislation; reason would suggest that any constitution needs to be revised at stated periods, indicated by nature itself.[5] He subsequently limited this period, upon the ultra-democratic principle that a majority of the adults of any generation, existing at a given time, would be dead nineteen years subsequent to that date. On this account Jefferson finds fault with the Virginia con-

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[1] Writings of James Madison. Vol. IV, pp. 101-3.
[2] Jefferson's Complete Works. Vol. IX, pp. 464, 496.
[3] Jefferson's Complete Works. Vol. VII, p. 487.
[4] Jefferson's Complete Works. Vol. III, p. 106.
[5] Jefferson's Complete Works. Vol. VII, p. 16.

stitution. It had been in existence forty years, and was now represented by one-third of the original contractors. What right, then, have these to bind the majority? If we adopt Jefferson's views, Virginians at that time were obeying a government *de facto* but not *de jure*. This kind of speculation ill befitted a statesman of his reputation.

The reconstruction of government in Massachusetts after the Revolution affords an illustration of the extent to which such a theory received apractical application. We find here the influence of Rousseau combined with principles drawn from the English Magna Charta and Bill of Rights; in fact, the theories of Locke and Rousseau reduced to practice.[1] In convention duly assembled it was resolved unanimously: (*a*), that the government about to be framed should be a free republic; and (*b*), that the people constituting it should be governed by fixed laws of their own making. We note here a direct return to the fundamental pact of Rousseau.[2]

The report of a constitution for this commonwealth, drawn up by a committee under the leadership of John Adams, states that "the body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good," and "the people inhabiting the territory called the Province of Massachusetts Bay do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign, and independent body politic, or State."[3] This constitution as finally adopted declared that "the ancient form of government was totally dissolved, and the people driven into a state of nature."[4] This would imply that every established law must conform to the principles of the fundamental pact; *i. e.*, the people, in their sovereign capacity being the origin of government, have a natural right to alter,

[1] The Life and Works of John Adams. Vol. IV, p. 216.
[2] Du contrat social, p. 309.
[3] The Life and Works of John Adams. Vol. IV, pp. 219, 230.
[4] Abingdon, Thoughts on the Letters of Burke, p. 86.

at any time, by common consent, both the existing form of government and constitution.

We find the principles of this theory more fully stated in the Constitution of Massachusetts than in those of other states or that of the United States. The former may be considered a fundamental pact in "*esse,*" its powers derived from the people, and the governed, viewed from one aspect, superior to their governors.[1] We find in it a distinct demarkation between the people, constitution, and civil law. The tenor of this constitution would lead one to suppose that a numerous people had assembled in a state of nature, and, like the patriarchs, "deputed a few fathers of the land to draw up for them a covenant."[2]

John Quincy Adams elaborated this patriarchal conception in an address at Providence, 1842. Here, after endeavoring to show that the social pact and resulting commonwealth were founded upon the laws of God and nature, he maintained that this pact "necessarily presupposes a permanent family compact, formed by the will of the man and the consent of the woman, and that in the formation of the social compact the will or the vote of every family must be given by its head, the husband and father."[3] If this assertion be true, one must act for many, even in the most democratic governments, and the persons for whom such an one acts must also be considered bound by natural, and divine law, to accept the results.

Referring to that part of the Massachusetts constitution where it is stated that "the whole people covenants with each citizen,"[4] he thinks we must consider "the whole people" as implying those merely who are capable of contracting for the whole. Such a number, we find from history, was quite small. This constitution was ratified and made binding because approved by two-thirds of the fifteen thousand who voted for it, out of a total population of three hundred and fifty thousand; *i. e.*, one contractor bound by his act thirty-five others.

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[1] Abingdon, Thoughts on the Letters of Burke, p. 41.
[2] H. Niles, Principles and Acts of the American Revolution, p. 52.
[3] Vid. North American Review, July, 1843.
[4] The Life and Works of John Adams. Vol. IV, p. 219.

John Quincy Adams always viewed government of the majority by a minority as one of the main characteristics of American constitutions, basing his theory, not upon convention, but on a law of nature, binding at all times and under all circumstances. Such a view naturally emanates from the patriarchal theory of government, fixing natural limitations as to age and sex upon the inchoate contractors from the moment of birth. It led him to conclude finally that government by a majority of the contractors is nowhere recognized in American institutions, the United States constitution being, in fact, a compound of four elements—democracy, aristocracy, monarchy and confederacy.

The theory of a social pact was not without its influence upon the American bench in the first few decades of this century. Judge Story appropriated the leading tenets of the theory, as may be seen from a glance at his great work upon the American Constitution; and Chief Justice Hosmer of Connecticut, referring to the omnipotence of a legislature over all cases where the constitution has not imposed a positive restraint, asserted that any usurpation by the legislative power over the vested rights of an individual is "a violation of the social compact and within the control of the judiciary."[1]

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[1]Goshen *vs.* Stonington, 4 Conn. Rep. 209, at 225.

CHAPTER IV.

THE social compact is now generally considered a legal fiction.[1] It adopts the old error of accounting for the origin of existing institutions from the standpoint of modern civilization. All compact theories of government start from the so-called state of nature. That there is a law of nature all political thinkers would admit; it forms the basis of civil law and has an universal application Admitting the existence of such a law, we need not attribute its origin to a state of nature. The latter exists, in its truest sense, only in society.

Viewed from a historical standpoint, the compact theory breaks down. Its advocates would make the primitive man little better than a beast, and far inferior to the savage of historic times. Niebuhr notes that there is no instance in history of savage tribes rising spontaneously to civilization.[2] The most degraded savages possess the germs of law, religion and society. On the contrary, the pre-social man, as described by Rousseau, is many removes from the savage, a position which makes the state of nature the more mythical and abstract.

A fiction of contract has frequently served to deepen the error in men's minds.[3] In the French Constituent Assembly we do not find the majority contracting with the minority, nor the whole body with the nation. It proceeded as the national representative, to choose and establish a form of government, but not on the lines laid down by advocates of the social pact. We notice in the so-called contractors a social potentiality utterly unknown to pre-historic man, as

[1] Mulford, The Nation, p. 43.
[2] Brownson, The American Republic, p. 51.
[3] Bluntschli, The Theory of the State, p. 278.

represented in the theory before us. That the assembly was dominated by contractual notions would not ensure a possibility of enforcing obedience, based merely upon the legal obligations of a pact. The same principle holds good with respect to the inception of our own government.

Granting, for the sake of argument, that a state of nature once existed, other objections to the theory still remain. How did men emerge from this state into society? Its advocates affirm that man in such a condition was devoid of any social ideas, a mere brute, bent only on satisfying the cravings of nature, possessing no germs of religion, law, or morality. The transition into society of such a being cannot be explained on evolutionary principles. Man can develop, but cannot create new forces. If, as they affirm, society has its origin neither in the nature of man nor in a divine revelation, mediate or immediate, how could compact bridge the gap between notions of might and of right? "The conception of a contract appears only at a later stage of civil society, and in its more definite form is the attainment of a long and elaborate legal culture."[1] Greek philosophers attributed the existence of law and society to the direct intervention of the gods. Few, at the present day, like the Epicureans, would consider society a causeless institution.[2] Man, by mere force of reason, could never pass from a state of nature into society.

Consider an individual in the pre-social state suddenly gifted by some superhuman power with political ideas; he might see the utility and rationale of society. Would this fact, however, ensure the origin of the state through compact? Men are naturally conservative and averse to change. States have been dissolved more frequently by the passions than by the reason of man. Society is an organism, having its roots in the past. Even in civilized communities statesmen find it difficult to introduce the most conservative reforms. The theory of compact means a rupture with the past. Men in a savage state, with the passions, not the reason, as their guiding prin-

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[1] Mulford, The Nation, p. 46.
[2] Brownson, The American Republic, p. 50.

ciple of life, would not be likely, from motives of enlightened self-interest, to listen to the arguments of some politically inspired being.

Again, to ensure the pact, men must enter with unanimity of sentiment, as free and equal inchoate citizens. This is an ideal position, and an insult to rational beings. Men may be driven into society like beasts, but in such a state where lies the efficacy of contract? Without unanimity, however, advocates of the theory do not think such a pact possible; it is absolutely necessary to make their speculation logical and consistent. If the compact theory seek to furnish a legal basis for the state's origin, upon any other principle than that of the mutual engagement of each with all and all with each, it practically institutes a rule by force, not by mutual compact.

We cannot apply the terms free and equal to man in the state of nature. They are conceptions belonging to him as a member of society; immutable principles, because man, being a "political animal," has never in his history found himself without them. Apart from man they become mere figments of the imagination.

Again, that dangerous form of the theory which makes the natural sovereignty of each individual survive the pact, would constitute a "congress of sovereigns" whenever they felt disposed to convene.[1] It reduces government to a mere agency, and favors secession and rebellion.

The compact theory has never satisfactorily explained the relations of future generations to the original pact. It is merely a partnership terminating at the death of the several contractors. What natural right has any generation to bind a succeeding one? Jefferson, as we have seen, noted this difficulty, and accordingly, favored a ratification of the constitution by each citizen once in nineteen years.[2]

Viewed from a juristic standpoint, the theory fails to account for certain rights existing in individuals and the state. The latter is more than a depository of the rights surrendered by

[1] Brownson, The American Republic, p. 52.
[2] Jefferson's Complete Works. Vol. VII, p. 16.

contractors. In fact we find that no rights can be abrogated by any pact, which, strictly speaking, are the essential property of individuals. The object of the state is to guarantee rights, not contract for their partial or complete surrender. In the latter case "society would be a refuge from complete shipwreck, which is reached by throwing overboard a part of our valuable freight, and not an institution intended for the protection of all a man's liberty and power."[1] Conceptions of right are coterminous with those of society; in fact, certain classes of rights can only there originate. If we consider the state as merely a receptacle for the surrendered rights of its constituents, it becomes a mere machine. Members of any corporation do not surrender their personal rights to the association.[2] The fact that I own railroad stock in some company would not legally prevent me from joining a syndicate for the purpose of constructing a competing road.

We shall find that liberty, or more properly speaking, license, existing in the so-called state of nature, needs the motor of positive law to make it a right. The social pact, granting its existence as a historical fact, can only be of the nature of a private contract, and therefore creates merely private rights. Public rights and public law, however, are not the creatures of convention.

Again, the state has rights which could never have been obtained by the surrender of personal rights. New rights and duties are continually appearing in society, through the ever-changing relations of individuals. The rights and obligations of husband and wife are not identical with those peculiar to them as unmarried persons. Whence comes the state's right of eminent domain, its jurisdiction over rivers, harbors, and the coast? Could this jurisdiction have ever been in the possession of pre-social man? The territory of a state means more than the sum total of land surrendered by the so-called contractors.

Lastly, from an ethical standpoint, the theory proves objectionable. Society is an organism, not simply an aggregation,

[1] Woolsey, Political Science. Vol. I, p. 193.
[2] Woolsey, Political Science. Vol. I, p. 194.

of individuals. We find running through it a vital principle of life and solidarity such as this mechanical theory cannot furnish. Society and man are necessary concomitants. The human body includes more than an aggregation of material particles; underneath this we find reason directing man's body towards certain definite ends. So the intelligence and might of the state comprises more than the collective intelligence and might of its citizens. "A sum of individual wills does not produce a common will."[1] No amount of contract, real or supposed, can make an organism out of a machine. "The state's right does not come from renounced power, but from its being in the natural order of things God's method of helping men toward a perfect life."[2]

The theory has dangerous tendencies. It practically destroys the conception of public law, leads to anarchy, and furnishes a pretext for dissolving and reconstructing the state whenever any petty grievance may advocate a change.

We may find, however, in the theory an element of truth. It shows that the state is not a mere organism, evolving itself without any relation to the varying needs of its constituents, but a rational, self-determining being. The latter view would tend to strip the state of that empiricism towards which it naturally gravitates.

Hobbes, we have seen, bases his political scheme upon the fundamental proposition, that "nature has given all things to everyone." It is hardly necessary to add that such a right could never be realized, either within or without society. My right to all things is bounded by (*a*) things necessary for my own preservation; (*b*) previous appropriation, recourse to force being always restricted by the law of nature to legitimate defence; and (*c*) the limit of humanity itself.[3] If I do not need all things for my own preservation, how can my right to the same be consistently asserted? The need of preservation is one thing, the need of luxuries something totally different. Any

[1] Bluntschli, The Theory of the State, p. 278.
[2] Woolsey, Political Science. Vol. I, p. 195.
[3] Janet, Histoire de la Science Politique, p. 175.

rational being can fix a limit to this necessity, and may not lawfully take what is superfluous to him, at the expense of another man's necessities. Even the right of self-preservation finds a limit in the person of every other man in the state of nature, since all are then equal.

Again, is the nature of man essentially distrustful? This may be refuted by appealing to society itself. "Our whole life and intercourse are founded upon trust."[1] Hobbes contradicts himself. The social compact itself shows that man in the state of nature trusts at least a majority of the inchoate citizens.

Justice, with Hobbes, is merely empirical, the creature of convention. Men at the present day generally consider it immutable and eternal. His whole scheme appears to be based upon selfishness, making force, not morality, the basis of the social pact. He also insists that no law can be made until a sovereign is estabished. Is not the act of fixing upon this person the fundamental law of society?[2] Hobbes had a true conception of the nature of sovereignty, but made an unfortunate mistake in locating it.

Locke's political works were composed in the interest of constitutional monarchy. The ideas there expressed have found a complete realization in modern politics. In accounting for the origin of the state, he argues from a moral and historical, rather than from a legal standpoint. His conception of property right in the pre-social state is too civilized to suit the exigencies of a barbarous herd, which men in the state of nature must have been. We have already pointed out that the state's right of eminent domain consists in something more than the collective property rights of each contractor. According to Locke, these inchoate property rights are regulated by a law of nature involving such a moral and legal scope, that we might assume, to know it would be to live in society.

He carefully distinguishes paternal and political power, the

[1] Lieber, Political Ethics, p. 330.
[2] Lieber, Political Ethics, p. 339.

former anticipating, and making a state of society possible. The various motives, however, which induced children to live under the father's prerogative, by tacit or express consent, would favor the presumption that the state owes its primary origin to the family, not compact. The latter might then have come in as the first act of society, and the necessary antidote to the irresponsibility of a ruler, who governed mainly through prerogative. Locke's conceptions of sovereignty and government are rational and generally accepted at the present day. His error lay in supposing that a contract between the people and an hereditary line of kings could furnish a legal basis for the dissolution and reconstruction of the commonwealth whenever the contract was broken. He distinguishes between the dissolution of society and that of government, but considers both liable to destruction. History has furnished many examples of the dissolution and reconstruction of governments, but not one with respect to society.

The rabid doctrines of Rousseau show to how great an extent the contract law of Rome might be perverted in its attempt to explain social relations as existing in modern times. His state of nature is based upon a series of unproved assumptions, containing "a description of a civilized heart too black and horrible to be transcribed."[1] We find the fundamental principle of his political system embodied in the "general will," towards the practical realization of which man's reason invariably leads him. In his efforts to disassociate sovereignty from the vicissitudes to which human government is exposed, he bounds the general will by so many restrictions as to make its practical expression next to an impossibility. Rousseau clearly sees that this ideal must accommodate itself to the exigencies of man's social nature, and find room for at least an occasional expression. He therefore reduces it to a simple majority of the contractors, with the single limitation that the vote of every citizen must be taken,[2] a position decidedly inconsistent with the lofty premises he had previously laid down.

[1] The Life and Works of John Adams. Vol. IV, p. 409.
[2] Du contrat social, p. 216. Note (e).

His ideas of government are substantially accepted at the present day by the advocates of free republics. Note however, that though it be the creature of sovereignty, government possesses moral as well as physical forces. Its sphere of action cannot be adequately expressed by mathematical computation, as Rousseau would lead us to suppose. The moral scope of government he certainly under-estimates. Criticizing in a general way his political creed, we may say that he made a great mistake in thinking that "all obligations and engagements must arise from the consent of the party bound."[1]

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[1] G. Bowyer, Universal Public Law, p. 57.

A statement of the educational institutions that the author has attended.

The College of New Jersey, B. A.,	1883-8.
The General Theological Seminary,	1888-91.
Columbia College, M. A.,	1889-91.